(30)

No. 99-62-CFX

Title: Santa Fe Independent School District, Petitioner
v.
Jane Doe, Individually and as Next Friend for Her Minor Children, Jane and John Doe, et al.

Docketed:
July 7, 1999

Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Jul 6 1999	Petition for writ of certiorari filed. (Response due August 6, 1999)
	Aug 4 1999	Brief amici curiae of Stephanie Vega, et al. filed.
	Aug 6 1999	Brief amici curiae of Texas, et al. filed.
	Aug 6 1999	Motion of Rutherford Institute for leave to file a brief as amicus curiae filed.
	Aug 18 1999	DISTRIBUTED. September 27, 1999
	Aug 24 1999	Supplemental brief of petitioner Santa Fe Independent School District filed.
	Sep 9 1999	Response requested.
	Oct 8 1999	Brief of respondents Jane Doe, et al. in opposition filed.
	Oct 20 1999	REDISTRIBUTED. November 5, 1999
	Nov 8 1999	REDISTRIBUTED. November 12, 1999
	Nov 15 1999	Motion of Rutherford Institute for leave to file a brief as amicus curiae GRANTED.
	Nov 15 1999	Petition GRANTED. limited to the following question: Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause. SET FOR ARGUMENT March 29, 2000. **********
	Dec 8 1999	Record filed.
	Dec 13 1999	Record filed.
	Dec 13 1999	Record complete.
	Dec 16 1999	Record filed.
	Dec 22 1999	BLANKET CONSENT for the filing of all amici briefs received from counsel for petitioner and counsel for the respondents.
	Dec 22 1999	Brief amici curiae of Texas Justice Foundation, et al. filed.
	Dec 23 1999	Joint appendix filed.
	Dec 28 1999	Brief amicus curiae of Student Press Law Center filed.
	Dec 28 1999	Brief amici curiae of Marin Ward, et al. filed..
	Dec 29 1999	Brief amici curiae of Texas Public School Students, et al. filed.
	Dec 29 1999	Brief amicus curiae of Texas Association of School Boards Legal Assistance Fund filed.
	Dec 29 1999	Brief amici curiae of Liberty Counsel, et al. filed.
	Dec 29 1999	Brief amici curiae of James M. Inhofe, et al. filed.
	Dec 29 1999	Brief of petitioner Santa Fe Independent School District filed.
	Dec 30 1999	Brief amici curiae of Steve Largent, et al. filed.
	Dec 30 1999	Brief amicus curiae of Northstar Legal Center filed.
	Dec 30 1999	Brief amici curiae of Spearman Independent School District, et al. filed.

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No. 99-62-CFX

Entry	Date	Proceedings and Orders
	Dec 30 1999	Motion of Rutherford Institute for leave to file a brief as amicus curiae filed.
	Dec 30 1999	Brief amici curiae of Texas, et al. filed.
	Dec 30 1999	Brief amicus curiae of Christian Legal Society filed.
	Jan 6 2000	Motion of Students and Parents of Santa Fe Independent School District for leave to participate in oral argument as amicus curiae and for additional time for oral argument filed.
	Jan 11 2000	Petitioner's reply to motion of Amici Curiae Students and Parents of Santa Fe Independent School District for leave to participate in oral argument and for additional time for argument.
	Jan 13 2000	CIRCULATED.
	Jan 18 2000	Motion of Rutherford Institute for leave to file a brief as amicus curiae GRANTED.
	Jan 20 2000	Motion of Students and Parents of Santa Fe Independent School for leave to participate in oral argument as amicus curiae and for additional time for oral argument DISTRIBUTED.
	Jan 24 2000	Motion of Students and Parents of Santa Fe Independent School District for leave to participate in oral argument as amicus curiae and for additional time for oral argument DENIED.
	Jan 31 2000	Brief amici curiae of Baptist Joint Committee on Public Affairs, et al. filed.
	Feb 1 2000	Motion of Marian Ward for leave to intervene filed.
	Feb 2 2000	Brief of respondents Jane Doe, et al. filed.
	Feb 2 2000	Brief amici curiae of American Jewish Congress, et al. filed.
	Feb 3 2000	Opposition of petitioner to motion of Marin Ward, et al. for leave to intervene filed.
	Feb 14 2000	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
	Feb 28 2000	Motion of Marian Ward for leave to intervene DENIED.
	Mar 3 2000	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument DISTRIBUTED.
	Mar 6 2000	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument GRANTED.
	Mar 8 2000	Reply brief of petitioner Santa Fe Independent School District filed.
	Mar 21 2000	Letter and Eleventh Circuit decision submitted by counsel for the petitioner and distributed.
	Mar 27 2000	Supplemental brief of respondents Jane Doe, et al. filed.
	Mar 28 2000	Supplemental brief of petitioner filed.
	Mar 29 2000	ARGUED.

Supreme Court, U.S.
FILED
JUL 6 1999

(1) '99 62

No. _____

In The

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

vs.

JANE DOE, Individually and as next friend for her minor children, Jane and John Doe, Minor Children; Jane Doe #2, Individually and as next friend for her minor child, John Doe, Minor Child, and John Doe, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

LEON KELLY FRELS*
**Counsel of Record*
LISA A. BROWN
REAGAN D. PRATT
BRACEWELL & PATTERSON, L.L.P.
711 Louisiana, Suite 2900
Houston, Texas 77002-2781
(713) 223-2900

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

(1) Does the Establishment Clause require public high schools to exclude religious content from student-initiated speech at a school function where non-religious student speech is permitted, or does such exclusion require viewpoint discrimination in violation of the Free Speech Clause?

(2) The court below held that the Petitioner must regulate the content of student-initiated invocations and benedictions at a high school graduation ceremony by directing students to keep their messages "non-sectarian" and "nonproselytizing."

Does a rule that requires high school officials to regulate student messages to ensure that they are "nonsectarian" and "nonproselytizing" violate First Amendment prohibitions against viewpoint discrimination and the establishment of religion?

LIST OF PARTIES

The Petitioner/Defendant is the Santa Fe Independent School District, a public school district located in Galveston County, Texas.

The Respondents/Plaintiffs are six individuals who are proceeding anonymously. Their true names have been listed on a separate document filed under seal with the Court.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 168 F.3d 806. (App. A & B.) The dissent from the court's denial of rehearing *en banc* is reported at 171 F.3d 1013. (App. C.) The only reported opinion of the district court concerned the Respondents' request to proceed anonymously, which is not at issue here. That order is reported at 933 F.Supp. 647. The relevant orders of the district court are unreported. (App. D & E.)

JURISDICTION

The court of appeals entered its judgment on February 26, 1999. (App. A.) The Petitioner timely moved for rehearing, which was denied on April 7, 1999. (App. C.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND SCHOOL BOARD POLICIES INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . . " U.S. Const. amend. I.

Two school district policies are at issue. Their full text is contained in Appendices F and G.

STATEMENT OF THE CASE

I. Proceedings below

The Petitioner, Santa Fe Independent School District ("Santa Fe ISD" or "Petitioner"), is a public school district located in Galveston County, Texas. In their original complaint, the Respondents accused Santa Fe ISD of various violations of the Establishment Clause of the First Amendment, invoking the jurisdiction of the district court under 28 U.S.C. § 1331.

The questions presented here arise from the Respondents' complaints that two of Santa Fe ISD's policies permitted religious content in speech by students at certain school events. The first policy permitted a high school student, selected by the student body, to deliver any "message" or "invocation" over the public address system before home varsity football games, for the purpose of promoting good sportsmanship. (App. F.) The second policy allowed graduating seniors to select a student to deliver an "invocation" or "benediction" to solemnize their high school graduation ceremony. (App. G.)

Santa Fe ISD moved for summary judgment, which was granted in part and denied in part. (R. at 380.) The district court ruled that the two policies would be constitutional only if they contained language directing students to keep their messages "nonsectarian and nonproselytizing." (App. E. at E12.) The district court declared the current policies invalid and ordered the school district to effectuate two alternative "back-up" policies that the school board had previously adopted

which did contain a "nonsectarian and nonproselytizing" restriction.

With respect to Respondents' complaints concerning other alleged violations of the Establishment Clause, the district court in its summary judgment order ruled that certain violations had occurred in the past. After a bench trial, however, the district court determined that many of the Respondents' complaints related to isolated occurrences and were not attributable to an unconstitutional policy or custom of the school board as required for liability under 42 U.S.C. § 1983. *See Jane Doe et al. v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 813 (5th Cir. 1999) (App. A at A13; App. D at D14-D15). The court found that none of the individual plaintiffs had suffered any damages. The district court entered a final judgment denying any further relief to the plaintiffs. (R. 816-17.)

Both the school district and the plaintiffs appealed to the Court of Appeals for the Fifth Circuit. Over a vigorous dissent, a panel of the court held that both policies are unconstitutional as written. The court of appeals agreed with the trial court that the school district must instruct graduating seniors to keep their commencement remarks "nonsectarian and nonproselytizing." 168 F.3d at 816-17 (App. A. at A19). The court further held, however, that no student prayers are permitted at other school-sponsored functions and that Santa Fe ISD's football game student speech policy violated the Establishment Clause because it theoretically allowed prayer as one of the types of speech a student might deliver. *Id.* at 822-23 (App. A at A38).

The Petitioner timely sought rehearing. On April 7, 1999, the panel denied rehearing and, on a vote of 9-7, the full court denied rehearing *en banc*. (App. C.)

II. Relevant background facts

1. Policy permitting student speech at football games

Prior to this litigation, the school district did not maintain a written policy concerning student messages or invocations at varsity football games.[1] Early in this litigation, the trial court ordered Petitioner to establish a written policy on student speech at football games. (R. 39; R. 123.) In response, the school board adopted a written policy stating:

> The Board has chosen to permit students to deliver a brief *invocation and/or message* to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition. . . . The student volunteer who is selected by his or her classmates may decide what *message and/or invocation* to deliver, consistent with the goals and purposes of this policy.

[1] Prior to this litigation, students did deliver invocations over the loud speaker before home games, although not pursuant to any particular written policy. The parties stipulated that there were three to six home games each season.

(App. F, emphasis added.) The policy further set forth the procedure for students to decide whether they want such a pre-game message and, if so, who will deliver it.[2]

The Fifth Circuit held that this policy violates the Establishment Clause because it permits prayer at a school-sponsored athletic event before a "government-organized audience." 168 F.3d at 822-23 (App. A at A24). The dissent argued that the pre-game ceremony policy is constitutional because "it neutrally accommodates both religious and nonreligious speech in a limited public forum." *Id.* at 834 (Jolly, J., dissenting) (App. B at B28).

2. The high school graduation policy

When this litigation began in April 1995, Santa Fe ISD's written policy concerning commencement stated that the graduating senior class "[may] elect to choose student volunteers to deliver *nonsectarian, nonproselytizing* invocations and benedictions for the purpose of solemnizing their graduation ceremonies." (R. 343, emphasis added.) This policy directly tracked a policy that the Fifth Circuit had upheld in *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) (*"Clear Creek II"*).

In July 1995, as part of its response to the district court's order that the school board clarify all of its speech

[2] There is no evidence in the record showing the content of any messages or invocations given before or after adoption of this policy. *See Jane Doe et al. v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 810 n.3 (5th Cir. 1999) (App. A at A4 n.3).

policies, the Santa Fe ISD school board amended the graduation policy and deleted the viewpoint-based "nonsectarian and nonproselytizing" restriction on student speeches. The July 1995 policy, however, provided that the former policy containing the restriction would be reinstituted if the district court disallowed the new policy.

The policy reviewed by the district court for facial constitutionality read in pertinent part:

> The Board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect by secret ballot, from a list of student volunteers, students to deliver invocations and benedictions for the purpose of solemnizing their graduation ceremonies.

(App. G.) The election permitted by this policy is held outside the school day.

The Fifth Circuit held that student-initiated, student-delivered invocations and benedictions at a high school graduation are constitutional, but only if the school district instructs students to keep their messages "nonsectarian and nonproselytizing." The court accordingly held that Santa Fe ISD's primary policy was unconstitutional, but approved the "back-up" policy because it contained the nonsectarian/nonproselytizing restriction. 168 F.3d at 816 (App. A at A36).

The dissent argued that the July 1995 policy created a limited public forum, was appropriately neutral, and, thus, was facially constitutional. The dissent argued that

the panel majority's nonsectarian/nonproselytizing restriction directly conflicts with this Court's opinions in *Engel v. Vitale*[3] and *Lee v. Weisman*,[4] both of which disapproved the concept of a state-approved "civic" or "nonsectarian" prayer. The dissent observed that the government both improperly establishes a religion and engages in illegitimate viewpoint discrimination when it restricts sectarian speech and proselytizing religious speech, while embracing ecumenical religious speech. 168 F.3d at 825, 827 (Jolly, J., dissenting) (App. A at B3, B9, B23).

REASONS FOR GRANTING THE PETITION

I. This Petition presents important First Amendment questions that should be settled by this Court.

The Fifth Circuit's decision sets forth an extraordinary interpretation of the First Amendment and directly conflicts with the relevant decisions of this Court. First, by prohibiting religious content in voluntary student speech at most school functions, even when non-religious speech is permitted, the court below has required public school administrators to engage in official discrimination based on religious viewpoint. As shown below, this prohibition conflicts with several of this Court's recent decisions, which require the accommodation of religious speech in fora where non-religious speech is permitted. Second, by mandating (in the name of the Establishment

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[3] 370 U.S. 42, 82 S.Ct. 1261 (1962).

[4] 505 U.S. 577, 112 S.Ct. 2649 (1992).

Clause) that school officials dictate the content and fervor of student prayers at graduation through the imposition of a "nonsectarian and nonproselytizing" restriction, the court below has placed its stamp of approval on a form of official "civic" prayer, which this Court previously has condemned as the unlawful establishment of religion. These results led Judge Jolly to declare in dissent that "the majority's view transgresses the most fundamental First Amendment rights," resulting in a "free fall into the black pit of the constitutionally forbidden." *Id.* at 824 (App. B at B1).

The Fifth Circuit's ruling will unconstitutionally entangle government with religion by requiring public school officials to scrutinize and censor student messages for the possibility of religious content, to a degree to be determined only by future court supervision. Governmental inspection of speech for religious content creates a constitutional risk that this Court has characterized as outright dangerous. "The first danger to liberty lies in granting the State the power to examine [speech] to determine whether or not [it is] based on some ultimate idea and, if so, for the State to classify [it]." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 835, 115 S.Ct. 2510, 2520 (1995).

The questions presented are important. This Court has stated that "vital" First Amendment rights were at stake when a university discriminated against student publications based on religious viewpoint. *Id.* at 835, 115 S.Ct. at 2520. The issues presented by this case, where a federal court has banned religious expression from student speech at high school functions, are no less vital.

The questions presented are neither abstract nor unusual: they are facing courts and schools across the country on a regular basis. At least two other circuits have addressed these issues recently, with mixed results and little certainty. The Ninth Circuit originally reached the opposite conclusion of the Fifth, upholding a student message policy on neutral accommodation grounds, in *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998). The court reasoned that the Constitution is not offended when a student, selected by purely neutral and secular criterion and given autonomy over the content of her message at a school assembly, has the option of making her message a prayer. *Id.* at 837-38. The *en banc* court, however, vacated this opinion as moot due to the graduation of the last student plaintiff. *Doe v. Madison Sch. Dist. No. 321*, No. 97-35642, 1999 WL 317050 (9th Cir., May 19, 1999).

The Eleventh Circuit currently has a student message policy under *en banc* review, a 2-1 panel having disagreed about the constitutionality of the policy in that case. The panel decision was issued on May 11, 1999, and was vacated three weeks later. *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, *vacated*, 1999 WL 354889 (11th Cir., June 3, 1999). The *Adler* panel rejected a school policy that permitted unrestricted student messages at the beginning and closing of a graduation ceremony, because it was possible that the student would give a prayer. The panel reasoned that speakers who use the school's platform and microphone are "state actors" and that their messages necessarily are attributable to the state.

These developments and the Fifth Circuit's divided vote *en banc*, along with other recent decisions on student

religious speech on campus,[5] demonstrate the divisiveness of the questions presented and the importance of the subject matter to citizens in all parts of the country. Further litigation is inevitable given the intensity of public interest in these issues and given the line-drawing that is the hallmark of Establishment Clause analysis.

At a minimum, the decision below and the Eleventh Circuit's now-vacated *Adler* decision demonstrate the need for guidance from this Court on whether government suppression of religious speech by high school students is constitutionally required or, to the contrary, constitutionally forbidden. If the approach taken by the Fifth Circuit and the *Adler* panel is incorrect, then this Court should end this line of jurisprudence. If, however, these circuits are correct that neutral accommodation is forbidden in a secondary school environment, then this Court should provide guidance to school districts on the extent of their constitutional duty to censor religious content from student speech.

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[5] *See, e.g., Chaudhuri v. State of Tennessee*, 130 F.3d 232 (6th Cir. 1997) (upholding university policy permitting "nonsectarian" prayer at graduation); *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (rejecting policy permitting student-delivered prayer at graduation); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994) (rejecting policy permitting student-delivered prayer at graduation), *cert. granted and decision vacated as moot*, 515 U.S. 1154 (1995).

II. The Fifth Circuit's requirement that school districts impose rules that exclude the possibility of student religious speech at high school functions conflicts with this Court's First Amendment precedents.

A. Excluding student religious speech from a forum where non-religious speech is permitted violates the Free Speech Clause.

This Court has recognized that religious speech is as "fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 2446 (1995) (plurality). Accordingly, this Court has held that schools may not use the Establishment Clause as a vehicle for refusing to accommodate religious viewpoints. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395-96, 113 S.Ct. 2141, 2148-49 (1993) (concluding that Establishment Clause concerns will not justify discrimination against religious speech absent "realistic danger" that community will view challenged practice as endorsement of religion). Despite these recent decisions, the Fifth Circuit effectively ruled here that schools henceforth must affirmatively exclude all student religious speech from most school assemblies, regardless of whether non-religious speech is otherwise permitted.

Under Santa Fe ISD's pre-game student message policy, prayer is simply one type of speech permitted. On its face, the policy allows a student, selected by the student body, to deliver *any* "message" or "invocation" before home varsity high school football games, to promote good sportsmanship and create an appropriate environment for the competition. The written policy does not

mention "prayer," much less require or otherwise encourage it. The policy explicitly divorces school officials from the decision-making process as to whether any messages – religious or not – will be delivered. The policy grants the selected student broad discretion concerning the content of the message he or she gives, requiring only that the message be consistent with the stated secular goals of the policy. The language of the policy plainly provides a forum for non-religious messages, as well as implicitly permitting religious invocations.[6]

The speech permitted under the football policy is analogous to the speech of a valedictorian or salutatorian during a graduation ceremony. As Justice Souter wrote in a concurring opinion in *Lee v. Weisman*:

> If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.

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[6] This conclusion is true without even addressing the court of appeals' erroneous assumption that the terms "invocation" and "benediction" necessarily mean "prayer." As recognized by Judge Jolly's dissent, the dictionary definition cited by the majority does not require an interpretation grounded in religion. *See Webster's Third International Dictionary* at 1190 (1993) (defining "invocation" as "the action or an act of petitioning for help or support"); *see also Webster's Ninth New Collegiate Dictionary* at 143 (1989) (defining "benediction" to mean "1: an expression of good wishes"); *Clear Creek II*, 977 F.2d at 969 (interpreting the term "invocation" to be free of religious content). Under Petitioner's policies, students remain free to craft a variety of solemnizing statements, to quote great philosophers, to read a poem – or to forego any solemnizing moment whatsoever.

505 U.S. 577, 630 n.8, 112 S.Ct. 2649, 2678 n.8 (1992) (Souter, J., concurring).

Nonetheless, despite the facial neutrality of the school district's pre-game message policy, the Fifth Circuit characterized it as a "prayer policy" and concluded that the Establishment Clause requires schools to exclude student religious speech from the forum. The court apparently discovered an Establishment Clause problem with the policy solely through the *possibility* that a selected student's message *might* be a prayer.

The panel's holding logically requires the suppression of religious viewpoints by speakers at all school-sponsored assemblies, not just athletic events.[7] Under the panel's decision, so long as the school district owns the microphone and the podium, it may not permit student speakers at an athletics banquet, prom night program, honor society ceremony, or student council assembly to include religion in the subject matter of their speech. The logic and reasoning of the Fifth Circuit's decision will require that school officials "prevent any speaker, including speakers as diverse as athletes, politicians, academics, entertainers, maybe even judges, from discussing a religious topic or invoking the Lord's name, to ensure that no audience member perceives that the school is endorsing the speaker's religious message." *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999) (Marcus, J., dissenting).

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[7] The court below held that a policy permitting invocations "cannot survive" outside the context "of the singularly serious nature of a graduation ceremony." 168 F.3d at 823 (App. A at A38).

The Fifth Circuit's categorical rejection of religious speech directly collides with the neutral accommodation principle advanced by this Court in *Lamb's Chapel*, *Rosenberger*,[8] and *Pinette*.[9] In *Lamb's Chapel*, the Court held that a school district violated the First Amendment when it excluded a religious group from a forum open to non-religious groups. *See* 508 U.S. at 395-96, 113 S.Ct. at 2148-49. The Court found "no realistic danger that the community would think that the District was endorsing religion or any particular creed" by allowing equal access to religious groups. *Id.*

Lamb's Chapel teaches that a school district, having created a forum for non-religious messages, is not permitted (much less required) to suppress all possibility that a speaker's message might have religious content. *Lamb's Chapel* followed this Court's earlier decision in *Widmar v. Vincent*,[10] which held that a university could not exclude student religious clubs from using college facilities that were open to non-religious student clubs.

More recently, in *Rosenberger*, the Court concluded that a public university had engaged in unconstitutional viewpoint discrimination when the university provided student activity funds to all student journals except those with religious content. The Court rejected the university's plea that it wished to avoid the impression that it supported religion. The "guarantee of neutrality is respected,

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[8] *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 831, 115 S.Ct. 2510, 2517 (1995).

[9] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 2446 (1995) (plurality).

[10] 454 U.S. 263, 102 S.Ct. 269 (1981).

not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 839, 115 S.Ct. 2510, 2521 (1995). The decision followed the long-standing principle that the Constitution does not require government "to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson*, 343 U.S. 306, 312, 72 S.Ct. 679, 683 (1952); *see also Lee v. Weisman*, 505 U.S. 577, 598, 112 S.Ct. 2649, 2649 (1992) (recognizing that a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution"); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18, 67 S.Ct. 504 (1947) ("State power is no more to be used so as to handicap religions, than it is to favor them.").

The decision below is openly hostile to *Rosenberger's* "guarantee of neutrality." Contrary to this Court's precedents, the Fifth Circuit concluded that government somehow endorses what it does not censor. This Court has explicitly rejected such reasoning, stating:

> [T]here is a crucial distinction between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. *We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support [religious] student speech that it merely permits on a nondiscriminatory basis.*

Bd. of Educ. v. Mergens, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372 (1990) (emphasis added).[11]

Moreover, the ruling below will require public school officials to engage in the impossible and constitutionally offensive task of reviewing and censoring student speech for religious overtones. The constitutional infirmity of such a mandate was explored in *Rosenberger*, where this Court observed that, were it to fashion a rule requiring the *exclusion* of religious student journals from the school's funding program:

> [Such a law] would require the University "to scrutinize the content of student speech, lest the expression in question – speech otherwise protected by the Constitution – contain too great a religious content . . . That eventuality raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy. To impose that standard on student speech at a university is to imperil the very sources of free speech and expression.

Rosenberger, 515 U.S. at 844, 115 S.Ct. at 2524; *see also Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999) (Marcus, J., dissenting) (objecting to majority's rule requiring "eradication" of religious speech from student messages, in part because it leaves school officials "with

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[11] The trial testimony in this case proved the wisdom of the Court's observation in *Mergens*. The only high-school-aged plaintiff to testify at trial, Janie Doe, testified that she understood that the religious messages at the 1994 graduation were given by students and that the content of those messages had not been dictated by the school district. (R. Vol. 7, p. 71.)

the unenviable task of identifying the religious content in student speeches for excision").

Finally, the Fifth Circuit has created what amounts to a *per se* rule against student religious speech at school functions and assemblies. This Court, however, has "uniformly rejected" as too "simplistic" such an "absolutist approach" in Establishment Clause cases. *See Lynch v. Donnelly*, 465 U.S. 668, 678, 104 S.Ct. 1355, 1361 (1984). Rather, "[i]n each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed." *Id.* The Fifth Circuit accordingly erred when it categorically banned student religious speech at high school events without individualized consideration of the actual likelihood that any reasonable observer would perceive that the state has established or endorsed religion by permitting a student speaker to deliver a message of her own choosing.

B. Permitting students to deliver religious speech in a forum where non-religious speech is allowed does not offend the Establishment Clause.

Contrary to the opinion of the panel below, the school district's pre-game student message policy is constitutionally sound under all of the various Establishment Clause tests used by the Court.

"Coercion" test. In *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649 (1992), the school principal invited a rabbi to deliver a prayer at a middle school graduation and directed him to keep his prayers nonsectarian. The Court found that this practice offended the Establishment Clause because it involved *"state officials directing* the

performance of a *formal religious exercise* at promotional and graduation ceremonies for secondary schools," thereby coercing participation by objectors. 505 U.S. at 588, 112 S.Ct. at 2655 (emphasis added).

In contrast to the policy at issue in *Lee*, Santa Fe ISD's student message policy *prohibits* school officials from directing students to make a speech, and it prohibits school officials from controlling the content of student speech if the students choose to take advantage of the opportunity offered. If the student body chooses to have a speaker, the student-selected student speaker is given complete control over the content of her message, subject to the stated goals of the policy. The policy neither requires nor prohibits a religious message. The school board "has neither scripted, supervised, endorsed, suggested, nor edited these personal viewpoints." 168 F.3d at 836 (Jolly, J., dissenting) (App. B at B31).

The *Lee* court also expressed concern about the psychological pressure to participate in a religious activity that would be placed upon students by government-mandated prayer. *Lee*, 505 U.S. at 593, 112 S.Ct. at 2658. The student message policy here alters this dynamic. *See Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 971 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993). Because any message during the pre-game ceremony is student-initiated, student-composed, and student-delivered, the specter of a government-approved authority figure that coerces participation is non-existent. In this age of mass media and the Internet, today's high school students are mature enough to appreciate the difference between student

speech and government speech, as this Court acknowledged in *Mergens*. And the principle of neutral accommodation in the high school arena is fully consistent with *Lee*, wherein the Court recognized that, "at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." *Lee*, 505 U.S. at 598-99, 112 S.Ct. at 2649. "*Lee* calls for the difficult task of separating a student's private message, which may be religious in character, from the school board's religious speech, protecting the former and prohibiting the latter." *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999) (Marcus, J., dissenting).

***"Lemon"* test.** Under the *Lemon* test, a government practice is unconstitutional if it lacks a secular purpose; its primary effect is either to advance or inhibit religion; and it excessively entangles government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971). The secular purpose prong focuses on the *predominant* purpose of the challenged rule; an incidental benefit to religion will not invalidate a rule. *See Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 2489 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 678, 104 S.Ct. 1355, 1361-62 (1984).

In this case, the court of appeals held that the football policy was devoid of a secular purpose. While the desire to solemnize a *graduation* may serve a secular purpose, the court wrote, football games "are hardly the sober type of event" worthy of solemnization. *See* 168 F.3d at 823 (App. A at A38). Easy examples, however, defy the court's conclusion: the pageantry of the Olympics' opening ceremonies, the singing of the National Anthem

before every NBA basketball game, the ceremonial remarks that precede the Special Olympics. As noted by the dissent, "[a]t sporting events, messages and/or invocations can promote, among other things, honest and fair play, clean competition, individual challenge to be one's best, importance of team work. . . . " *Id.* at 835 (Jolly, J., dissenting) (App. B at B29). The pre-game speech also is an opportunity to encourage good sportsmanship and communicate good wishes to the students and parents in the stands.

The primary effect of the school district's football ceremony policy neither advances nor inhibits religion, because the policy is neutral with regard to the content of any statement or invocation that may be given. "To have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence." *Corporation of Presiding Bishop of the Church of Jesus Christ v. Amos*, 483 U.S. 327, 107 S.Ct. 2862, 2869 (1987). The government does not actively advance religion by neutrally permitting its citizens to publicly express religious sentiments.

Finally, the football message policy does not call for the school's "excessive entanglement" with religion because the school district has overtly divorced itself from the decisions whether a message will be given and, if so, what type of message it will be.

"Endorsement" test. The endorsement test seeks to determine whether the government endorses religion by means of the challenged action. *See County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086 (1989). The state unconstitutionally endorses religion when it conveys a

message that a particular religion is "favored," "preferred," or "promoted" over other beliefs. *Id.* at 593, 109 S.Ct. at 3101. Endorsement does not occur, however, merely because of the possibility that someone might erroneously conclude that the state is endorsing religion. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 763, 765, 115 S.Ct. 2440, 2448 (1995) (Scalia, J., plurality opinion). Rather, "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer" and not that of a casual passerby. *Id.* at 773, 780, 115 S.Ct. at 2452, 2455 (O'Connor, J. concurring).

The panel majority below nonetheless concluded that a policy that "permits" religious speech "undoubtedly conveys" approval of religion. *See* 168 F.3d at 817-18 (App. A at A24). This conclusion directly contradicts this Court's admonishment in *Mergens* that "a school does not endorse or support [religious] student speech that it merely permits on a nondiscriminatory basis." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372 (1990). No state endorsement exists here because the school merely permits speech on a nondiscriminatory basis. Moreover, by limiting the policy to a high school event, the policy is aimed at persons with the maturity to realize that the message given is, in fact, that of a student and not that of the state.

In conclusion, excluding religious speech from the categories of speech permitted by the message policy is not required by the Establishment Clause and, instead, violates the Free Speech Clause. This Court should grant this petition and reverse the Fifth Circuit's contrary holdings.

III. The Fifth Circuit's requirement that student-delivered invocations and benedictions at a high school graduation be "nonsectarian and nonproselytizing" will result in illegal viewpoint discrimination and the impermissible establishment of a "civic" religion.

The circuit court's decision that student prayers at graduation must be "nonsectarian and nonproselytizing" not only directly contradicts controlling Supreme Court precedent, it "achieves the jurisprudentially rare result of offending not only one, but three provisions within the First Amendment."[12] 168 F.3d at 825 (Jolly, J., dissenting) (App. B at B3-B4).

The majority's holding conflicts with *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649 (1992), and *Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 1266-67 (1962). In *Lee*, this Court explicitly disapproved of a school's practice of directing a visiting clergyman to deliver a "nonsectarian" prayer at a school event. The Court observed that, by advising the cleric to deliver a "nonsectarian" prayer, the school principal had "directed and controlled the content of the prayers." 505 U.S. at 588, 112 S.Ct. at 2656. The court held that this control itself resulted in an impermissible establishment of a "civic" religion:

> We are asked to recognize the existence of a practice of nonsectarian prayer. . . . There may be some support [for the statement] that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. . . . [However, the] suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

[12] Judge Jolly identified the Establishment Clause, the Free Speech Clause, and the Free Exercise Clause. *See* 168 F.3d at 825 (Jolly, J., dissenting) (App. B at B4 n.5).

Id. at 589-90, 112 S.Ct. at 2656-57.

In *Engel v. Vitale*, the Court wrote that "the fact that the prayer may be denominationally neutral" does not "free it from the limitations of the establishment clause." 370 U.S. at 430, 82 S.Ct. at 1266-67. A public school is prohibited from "placing its official stamp of approval upon one particular kind of prayer." *Id.* at 429, 82 S.Ct. at 1266; *see also Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir.) (criticizing nonsectarian/nonproselytizing restriction in a school prayer statute because it "will inevitably involve school officials in determining which prayers are 'nonsectarian and nonproselytizing' "), *cert. denied sub nom. Moore v. Ingebretsen*, 519 U.S. 965 (1996).

The Fifth Circuit has nonetheless placed its "official stamp of approval upon one particular kind of prayer" – those that are nonsectarian and nonproseltyzing. By doing so, the panel has directed the school district to establish an official or civic "nonsectarian" religion in the precise manner and for the precise purpose that the *Lee* and *Engel* courts ruled constitutionally forbidden.

The panel's decision to control the content of citizens' prayers also conflicts with this Court's decisions protecting students' liberties of free expression and free exercise of religion, liberties guaranteed by the same constitutional provision which the panel purported to defend. As

discussed above, the government may not use the Establishment Clause to avoid its responsibility to neutrally accommodate religious viewpoints. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94, 113 S.Ct. 2141, 2147-48 (1993). Indeed, the Court has recognized that religious speech is one of the core types of speech protected by the First Amendment:

> [G]overnment suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free speech protection religious proselytizing, or even acts of worship.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760, 115 S.Ct. 2440, 2446 (1995) (plurality).

Even in the public school context, the Court has required schools to balance the competing mandates of the Establishment and Free Speech clauses by neutrally accommodating religion, neither favoring it nor discriminating against it. *See generally Bd. of Educ. v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372 (1990) (concluding that the Free Speech and Free Exercise Clauses protect religious speech by secondary school students, and a school does not violate the Establishment Clause by permitting such speech on a nondiscriminatory basis); *Lamb's Chapel*, 508 U.S. at 392-93, 113 S.Ct. at 2147 (declaring that public school may not deny access to facilities based upon religious viewpoint).

The Fifth Circuit attempted to avoid this rule by reasoning that the school district had not created a "public forum" for speech at graduation and, therefore, could

not respect the free speech and free exercise rights of its student speakers. Even if the panel's classification of the forum were correct, however, the panel's holding contradicts well-established law. The state may not engage in viewpoint discrimination even in non-public fora. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 955 (1983). While control over access to a non-public forum can be based on subject matter and speaker identity, the distinctions drawn must still be "viewpoint neutral." *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 787, 806, 105 S.Ct. 3439, 3451 (1985).

This Court expressly adhered to this principle in *Lamb's Chapel*. In holding that the First Amendment prohibited a school from discriminating against a speaker based upon its religious perspective, the Court engaged in no analysis of what type of forum had been created. *See* 508 U.S. at 391-92, 113 S.Ct. at 2147 ("We need not rule on this issue."). Rather, the Court held that the exclusion of a group based on its religious viewpoint would be "plainly invalid" even in the context of a non-public forum . . .

> under our holding in *Cornelius* that "[a]lthough a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."

Id. at 394, 113 S.Ct. at 2147 (alterations in original) (citations omitted).

Likewise, even if Santa Fe ISD's graduation policy creates a non-public forum only for invocations, the school district would violate the First Amendment if it attempted to suppress sectarian invocations in favor of ecumenical or non-religious invocations.[13] "When the government restricts sectarian and proseltyzing speech, while embracing ecumenical religious speech, the government has engaged in illegitimate, viewpoint discrimination." 168 F.3d at 825 (Jolly, J., dissenting) (App. B at B3); *see also ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1492 (3d Cir. 1996) (Mansmann, J., dissenting) (finding a graduation prayer policy that did not prohibit sectarian prayer more defensible than one limited to non-sectarian prayers because it "comports with the First Amendment's prohibition against the inhibition of the practice of religion or of free expression, while at the same time precludes even the remote possibility of an establishment of religion by virtue of its uncompromising neutrality").

This Court's "consistent interpretation of the Establishment Clause allows no exception for the nonsectarian and nonproselytizing prayer." 168 F.3d at 827 (Jolly, J., dissenting) (App. B at B9). "[I]t denies government the

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[13] The panel majority acknowledged that review of student prayers "for sectarianism and proselytization" would "*undoubtedly* constitute impermissible viewpoint discrimination," provided that "the students' graduation prayers constituted purely private speech." 168 F.3d at 822 n.12 (App. A at A35 n.12) (emphasis added).

ability to favor a composite ecumenical religion just as surely as it denies the ability to favor one of its components." *Id.* This Court should grant review of the decision below and consider whether the Constitution's mandates under the Establishment, Free Exercise, and Free Speech clauses are better honored through the neutral accommodation of student viewpoints, whether they be sectarian, ecumenical, or religion-free, rather than through government censorship of the content of student prayers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEON KELLY FRELS*
*Counsel of Record
LISA A. BROWN
REAGAN D. PRATT
BRACEWELL & PATTERSON, L.L.P.
711 Louisiana, Suite 2900
Houston, Texas 77002-2781
(713) 223-2900

Attorneys for Petitioner

DATED: July 2, 1999

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40150

JANE DOE, Individually and as next of friend for her minor children,
Jane and John Doe, Minor Children;
JANE DOE #2, Individually and as next of friend for her minor child,
John Doe, Minor Child, and John Doe, Individually,

Plaintiffs-Appellees-Cross Appellants,

versus

SANTA FE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants,

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant-Cross Appellee.

Appeals from the United States District Court
for the Southern District of Texas

Before JOLLY, WIENER, and STEWART, Circuit Judges.

WIENER, Circuit Judge:

In *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992) (*Clear Creek II*), we declared Clear

Creek's policy of allowing a student-selected, student-given, nonsectarian, nonproselytizing invocation and benediction at high school graduations ("Clear Creek Prayer Policy") not violative of the Establishment Clause of the First Amendment to the United States Constitution. The primary questions posed by this case are: (1) whether the constitutionality of a Clear Creek Prayer Policy depends on its "nonsectarian, nonproselytizing," features, and (2) whether the venue of a Clear Creek Prayer Policy may be extended to high school football games without violating the applicable provisions of the Constitution of the United States. For the reasons that follow, we hold that (1) a public school prayer policy that, unlike a Clear Creek Prayer Policy, permits sectarian, proselytizing benedictions and invocations cannot pass constitutional muster, and (2) extending a Clear Creek Prayer Policy to cover messages delivered before a high school football games violates the Constitution even if such a policy includes the "nonsectarian, nonproselytizing" restrictions.

I

FACTS AND PROCEEDINGS

Santa Fe Independent School District ("SFISD") is a political subdivision of the State of Texas, and is governed by an elected, seven-person Board of Trustees. As its name suggests, SFISD is responsible for overseeing the public educational programs and facilities of a small community in south Texas. In performing this role, SFISD supervises over 4,000 students each of whom attends one of five schools, two primary schools, one intermediate

school, one junior high school, and one high school. The plaintiffs in this action (the "Does") are several children currently or formerly enrolled in SFISD schools and their parents. In light of the sensitive nature of the action, they have been allowed to proceed anonymously.[1]

For some time prior to the onset of this litigation, the Does believed that SFISD was pursuing policies that were in contravention of the Establishment Clause. The evidence that the Does were able to accumulate covered a wide variety of disturbing incidents and practices, but for purposes of illustration we focus on the following two items.[2]

First, in April 1993, while plaintiff Jane Doe II was attending her seventh grade Texas History class, her teacher, David Wilson, handed out fliers advertising a Baptist religious revival. Jane Doe II asked if non-Baptists were invited to attend, prompting Wilson to inquire about her religious affiliation. On hearing that she was an

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[1] A decision, we might add, that many SFISD officials apparently neither agreed with nor particularly respected. Attempts by SFISD administrators, teachers, and other employees "overtly or covertly to ferret out the identities of the Plaintiffs . . . by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping' " eventually prompted the district court to threaten to visit upon them "THE HARSHEST POSSIBLE CONTEMPT SANCTIONS" and/or "CRIMINAL LIABILITY" (emphasis in original) if they did not cease their investigations.

[2] Our recitation of the evidence, including the pseudonyms used for specific anonymous plaintiffs, is taken principally from the joint stipulations of the parties. References to "SFISD" include the Board of Trustees, the superintendent, and other responsible administrative officials as appropriate.

adherent of the Church of Jesus Christ of Latter Day Saints (Mormon), Wilson launched into a diatribe about the non-Christian, cult-like nature of Mormonism, and its general evils. Wilson's comments inspired further discussion among Jane Doe II's classmates, some of whom reportedly noted that "[h]e sure does make it sound evil," and "[g]ee, . . . it's kind of like the KKK, isn't it?" Jane Doe II was understandably upset by this incident, and two days later, her mother, Jane Doe I, complained to SFISD. Because Wilson's actions were concededly contrary to written SFISD policies barring the distribution of religious literature in class or the verbal abuse of any student, he was given a written reprimand and directed to apologize to the Does and to his class.

Second, and of greatest significance to this case, for an undisclosed period of time leading up to and including the 1992-93 and 1993-94 school years, SFISD allowed students to read overtly Christian prayers from the stage at graduation ceremonies and over the public address system at home football games.[3] The prayers were

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[3] For example:

1994 Graduation Invocation

Please bow your heads. Dear heavenly Father: Thank you for allowing us to gather here safely. We thank you for the wonderful year you have allowed us to spend together as students of Santa Fe. We thank you for our teachers who have devoted many hours to each of us. Thank you Lord for our parents and may each one receive a special blessing. We pray also for a blessing and guidance as each student moves forward

delivered as "invocations" or "benedictions" for these events, and typically were given by officers of the student council.[4] Of course, SFISD maintained complete control

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in the future. Lord, bless this ceremony and give us all a safe journey home. In Jesus's name we pray.

1994 Graduation Benediction

Our most gracious heavenly Father: We thank you for bringing us to this, our graduation. We ask you to be with us as we start a new beginning to our lives. Father: We express our gratitude to all that have helped us over the past three years. Especially do we thank our parents, teachers, and friends who encouraged us, counseled us, and always extended a helping hand when needed. Please see us safely through this night and the tomorrows of our lives. In Jesus's name, Amen.

The record contains no examples of the football game prayers, but we may assume for purposes of this opinion that they were similar in content. As a bit of further background, it is interesting to note that the closing paragraph of the salutatory address at the 1994 graduation was actually more proselytizing than the invocation and benediction:

> . . . There is only one thing which we as Christians can truly rely [on]: the faithfulness and strength of a loving God. It is now that each of us must stand on a solid rock of Jesus Christ, stand up for those things on which we believe. Even if it is alone that we must stand. We, having done all, must continue to stand in faith remembering that Christ would have suffered and died for only one of us. So we begin the journey of life, not a life of mediocrity and compromise, but the possible life which Christ has promised, a life of abundance and joy, being confident of this very thing, that he who has begun a good work in you will complete it until the day of Jesus Christ. Thank You.

[4] In the case of the football games, the prayers were given by the student council "chaplain," a position created by the

over the programs and facilities during the reading of the prayers, including the ability to mute the microphone or remove the speaker. Furthermore, the text of the graduation invocations and benedictions was screened by SFISD for content prior to the ceremony.

With regard to the football games, it is undisputed that no written policy governing the invocations existed prior to the onset of litigation in this case. With regard to graduation, SFISD did draft a written policy (the "June Policy"), but only in time for the 1994 ceremony. It read as follows:

> The Board shall not permit clergymen to deliver invocations or benedictions at promotional and graduation ceremonies for secondary schools; nor shall school officials direct the performance of a formal religious exercise at such ceremonies. *Lee et al. v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) [See also EMI]
>
> Dated June 17, 1993

After the 1994 graduation ceremony, but before the onset of the instant litigation, SFISD amended its graduation policy (the "October Policy") to reflect more closely its interpretation of our decision in *Clear Creek II*:

> The Board shall not permit clergymen to deliver invocations or benedictions at promotional and graduation ceremonies for secondary schools; nor shall school officials direct the performance of a formal religious exercise at such ceremonies. *Lee et al. v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) [See also EMI (LEGAL)]
>
> The Board *may permit* the graduating senior class(es), with the advice and counsel of the senior class sponsor, to elect to choose student volunteers to deliver *nonsectarian, nonproselytizing invocations and benedictions* for the purpose of solemnizing their graduation ceremonies. *Jones v. Clear Creek ISD*, 977 F.2d 963 (5th Cir. 1992), cert. denied, 508 U.S. 967, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993).
>
> Dated October 20, 1994

In April 1995, the Does filed suit against SFISD in the Federal District Court for the Southern District of Texas.[5] Citing the instances described above and others, they alleged that SFISD maintains policies and practices in violation of the Establishment Clause. They demanded prospective injunctive and declaratory relief in addition to money damages under 42 U.S.C. § 1983.

In the following month, acting in response to the Does' motion for a temporary restraining order regarding the imminent 1995 graduation ceremonies, the district court ruled that, consistent with SFISD's October Policy and our decision in *Clear Creek II*, student-selected, student-given, nonsectarian, nonproselytizing invocations

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student-written constitution and elected by students. It appears that at graduation the student council president customarily gave the invocation, and the secretary customarily gave the benediction.

[5] The Does also sued several members of SFISD's Board of Trustees and administrators in their individual capacities, but all of these defendants were dismissed in the early stages of the case.

and benedictions would be permitted, and that such invocations and benedictions could take the form of a "non-denominational prayer." Although cautioning that SFISD should play no role in selecting the students or scrutinizing and approving the content of the invocations and benedictions, the district court went on to note gratuitously that "generic prayers to the 'Almighty', or to 'God', or to 'Our Heavenly Father (or Mother)', or the like, will of course be permitted. *Reference to any particular deity, by name, such as Mohammed, Jesus, Buddha, or the like, will likewise be permitted,* as long as the general thrust of the prayer is non-proselytizing, as required by [*Clear Creek II*]."[6] In anticipation of addressing the central issues of the case, the trial court also admonished that SFISD would in due course be directed to clarify a number of its Establishment Clause policies, and, in particular, "to establish or to clarify existing policies to deal with either banning all prayer, or firmly establishing reasonable guidelines to allow nonsectarian and non-proselytizing prayer at all relevant school functions."

As an initial and, by its own admission, "emergency" response to the court's order, prior to the 1995 graduation, SFISD made a few changes (the "May Policy") to its pre-litigation October Policy:

> The Board *has chosen to permit* the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen the class shall elect by

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[6] Emphasis added.

> secret ballot, from a list of student volunteers, students to deliver *nonsectarian, nonproselytizing invocations and benedictions* for the purpose of solemnizing their graduation ceremonies. *Jones v. Clear Creek ISD*, 977 F.2d 963 (5th Cir. 1992) cert. denied 508 U.S. 967, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993).
>
> Dated May 23, 1995

By July, SFISD apparently had a chance to conduct a more thorough review of its fundamental position on graduation invocations and benedictions. At this point, the May Policy was superseded by a new and, for purposes of this appeal, final version (the "July Policy"):

> The Board *has chosen to permit* the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect by secret ballot, from a list of student volunteers, students to deliver *invocations and benedictions* for the purpose of solemnizing their graduation ceremonies.
>
> *If the District is enjoined by court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.*
>
> The Board *has chosen to permit* the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect

> by secret ballot, from a list of student volunteers, students to deliver *nonsectarian, nonproselytizing invocations and benedictions* for the purpose of solemnizing their graduation ceremonies.
>
> Dated July 24, 1995

As SFISD readily admits, the fact that the initial paragraph of this final graduation prayer policy intentionally removes the words "nonsectarian, nonproselytizing" constitutes an additional and very substantial deviation from both *Clear Creek II* and SFISD's October and May Policies. Indeed, it is this deviation that ultimately forms the core of the issues before us today.

Less than two weeks later, the district court made good on its earlier suggestion and formally ordered SFISD "to finalize a unified 1st Amendment religion/expression policy addressing all issues with options in content clearly set out" by October 13. The court also directed both parties to prepare and submit stipulations of fact by the same date.

In October 1995, SFISD for the first time adopted a written policy to address football game invocations. Its provisions were essentially identical to those of the July Policy on graduations. The football game prayer policy ("Football Policy") provides for a student-selected, student-given "brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." As with the July Policy on graduation, the Football Policy was to

provide no further guidance as to content (i.e., no "nonsectarian, nonproselytizing" limitation) *unless* SFISD should be "enjoined by a court order" to do so. "Then and only then" was an alternate policy containing a "nonsectarian, nonproselytizing" content limitation to take effect automatically. On the preordained date, SFISD submitted the July Policy and the Football Policy for the court's consideration.

Pursuant to a supplemental court order, the Does and SFISD eventually submitted 131 joint stipulations of fact. In February 1996, SFISD filed a motion for summary judgment on the basis that no evidence supported the conclusion that the school district currently or formerly sanctioned a policy or practice in violation of the Establishment Clause. The Does responded to this motion, but did not file a counter motion for summary judgment.

Early in June 1996, the district court issued a broad preliminary ruling addressing many of the issues in the case. Beginning with SFISD's liability for past practices, the court denied the school district's pending motion for summary judgment and instead granted summary judgment, *sua sponte*, in favor of the Does. Analyzing the question under the three parallel Establishment Clause tests applied by this court in *Clear Creek II*, 977 F.2d at 966-72, and *Ingebretsen v. Jackson Public School District*, 88 F.3d 274, 278-79 (5th Cir.), *cert. denied sub nom. Moore v. Ingebretsen*, ___ U.S. ___, 117 S.Ct. 388, 136 L.Ed.2d 304 (1996), the district court found that many of the incidents identified by the Does constituted impermissible coercion, endorsement, or purposeful advancement of religion by the State, and that SFISD could be fairly charged with having had *de facto* policies favoring the incidents

because they "occurred amidst the School District's repeated tolerance of similar activities and oftentimes with [its] awareness and explicit approval." In reaching this conclusion, the court noted that it relied on such of the Does' factual averments as had been acquiesced in by SFISD in addition to those identified in the joint stipulations, but that the court would afford SFISD a limited opportunity to object to the liability finding at the subsequent trial on damages, which the court tentatively scheduled for mid-July 1996.

In addressing the question of prospective injunctive relief from current policies, the district court decided to grant SFISD's motion for summary judgment on that point. It ruled that, whatever may have happened in the past, SFISD had abandoned any potentially problematic policies other than those concerning invocations and benedictions at graduations and football games. As to these policies, the court noted that they were essentially identical to the policies upheld by this Court in *Clear Creek II*, "except for the crucial distinction that the School District's [primary] policies do not require that any prayers delivered be nonsectarian and non-proselytizing." Because it read *Clear Creek II* as mandating this additional limitation, the court held that the initial paragraph of SFISD's July Policy and Football Policy constitutionally deficient. As each policy also contained an alternative provision that was fully consistent with *Clear Creek II*, and was specified to clutch in automatically if the court were to find the basic policy constitutionally lacking, however, the court ultimately concluded that injunctive relief would not be appropriate; the court could simply "order" SFISD to implement the fall-back

provisions of the July Policy and the Football Policy. The court therefore denied the Does' request for injunctive relief of any kind.

In December 1996, following a two-day trial on damages, the district court entered its final judgment. Citing *Collins v. City of Harker Heights*, 503 U.S. 115, 120-21, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), and *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984), the court held that imputed liability is not cognizable under § 1983, and that the Does had to prove more than the occurrence of isolated incidents to demonstrate that SFISD maintained an unconstitutional policy or custom for which it could be held liable in money damages under that statute. Reversing an unclear portion of its earlier ruling, the court found that each of the incidents for which the Does claimed actual, compensable harm, particularly the David Wilson "Mormon" matter, were nothing more than isolated occurrences, and were not attributable to a policy or custom of SFISD. The court further ruled, in the alternative, that, even if the claimed incidents could be attributed to SFISD policies, the Does had failed to prove any actual, compensable harm. The court concluded by entering a take-nothing judgment against the Does. Because it also concluded that the Does were unsuccessful as to every major issue in the litigation, the court ruled that they were not prevailing parties and denied their motion for attorney's fees under 42 U.S.C. § 1988. The court stated in the alternative that, even if the Does were technically prevailing parties, it would nonetheless deny them attorney's fees as an exercise of discretion, given that their success had been so limited and that they had protracted the litigation unnecessarily by insisting on

going to trial on their damage claims. From this final judgment, both SFISD and the Does timely appealed.

In its appeal, SFISD primarily challenges the district court's determination that a Clear Creek Prayer Policy must require that prayers or statements be "nonsectarian, nonproselytizing" to be constitutional. Should we be inclined to reverse the district court as to the denial of damages and attorney's fees, however, then SFISD also challenges the finding of liability for past Establishment Clause violations, claiming both procedural and substantive errors on the part of the district court.

In their appeal, the Does argue that the district court erred in (1) defining "nonsectarian, nonproselytizing" to permit reference to particular deities; (2) allowing SFISD to extend a Clear Creek Prayer Policy to football games; (3) denying injunctive relief; and (4) refusing to award attorney's fees. One plaintiff, referred to above as Jane Doe II, also appeals the denial of damages for the David Wilson "Mormon" incident.

II

ANALYSIS

We begin with SFISD's primary argument that a Clear Creek Prayer Policy need not include the "nonsectarian, nonproselytizing" requirements to be constitutional. SFISD rests this argument on two complementary contentions: (A) the nonsectarian, nonproselytizing restrictions of *Clear Creek II* were irrelevant to the court's Establishment Clause holding; and (B) SFISD, in its July Policy, has created a *limited public forum* and, therefore,

not only need not, but lawfully cannot, restrict the student speakers to nonsectarian, nonproselytizing invocations and benedictions, as such restrictions would constitute impermissible viewpoint discrimination under the Free Speech Clause.[7]

A. The Establishment Clause

In beginning our analysis, it is well to note that our role is necessarily limited to elucidating our prior precedent in the light of its context and such subsequent clarifications as the Supreme Court has announced. *See Hogue v. Johnson*, 131 F.3d 466, 491 (5th Cir. 1997) ("One panel of this Court may not overrule another [absent an intervening decision to the contrary by the Supreme Court or the en banc court . . .]."), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1297, 140 L.Ed.2d 334 (1998). The initial question may therefore be conveniently summarized by reviewing the holdings of *Clear Creek II* and its Supreme Court predecessor, *Lee*. By way of background, however, we first set forth the Supreme Court's three Establishment Clause tests.

1. Three Supreme Court Tests

As we have often observed, Establishment Clause jurisprudence is less than pellucid. We examine practices challenged on Establishment Clause grounds under three

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[7] Although for the sake of simplicity and clarity we address SFISD's arguments only as they relate to graduation ceremonies, our analysis applies with equal, if not greater, force to the Football Policy as well.

complementary (and occasionally overlapping) tests established by the Supreme Court. *Clear Creek II*, 977 F.2d at 963; *Ingebretsen*, 88 F.3d at 278.

a. The Lemon Test

The first test, and the one of the longest pedigree, is the disjunctive three-part *Lemon* test, under which a government practice is unconstitutional if (1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

b. The Coercion Test

The second test, which the Court announced in *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (invalidating school district's policy permitting school principals to invite clergy to give invocations and benedictions in form of "nonsectarian" prayer at graduation ceremonies), is commonly referred to as the Coercion Test. Under this test, school-sponsored religious activity is analysed to determine the extent, if any, to which it has a coercive effect on students. "[U]nconstitutional coercion [occurs] when: (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors." *Clear Creek II*, 977 F.2d at 970 (citation omitted).

c. The Endorsement Test

The third test, known as the Endorsement Test, seeks to determine whether the government endorses religion by means of the challenged action. *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). The government unconstitutionally endorses religion when "it conveys a message that religion is 'favored,' 'preferred,' or 'promoted' over other beliefs." *Id.* at 593, 109 S.Ct. 3086.

2. *Lee* and *Clear Creek II*

In *Lee*, the Supreme Court declared a school district's policy of allowing a high school principal to invite a religious official to give a nonsectarian, nonproselytizing invocation and benediction at graduation to be an unconstitutional "coercion" of participation in a state-directed religious exercise. *Lee*, 505 U.S. at 586, 112 S.Ct. 2649. Four Justices appeared to find the policy to be an unconstitutional "endorsement" of religion as well. *Id.* at 604-05, 112 S.Ct. 2649 (Blackmun, J., joined by Stevens & O'Connor, JJ., concurring) & 629-30 & n.8 (Souter, J., joined by Stevens & O'Connor, JJ., concurring); *cf. Allegheny*, 492 U.S. at 594, 109 S.Ct. 3086 (discussing endorsements).

Then, in *Clear Creek II*, applying the three Establishment Clause tests set forth above, we held that Clear Creek's policy of allowing a student-selected, student-given, nonsectarian, nonproselytizing invocation and benediction at a high school graduation ceremony – SFISD's fall-back provision in the July Policy – did not

violate the dictates of the Establishment Clause. *Clear Creek II*, 977 F.2d at 968-72.

SFISD asserts that a close reading of *Clear Creek II* reveals that the school district's graduation policy escaped the result in *Lee* not because of its "nonsectarian, nonproselytizing" content limitation, but rather *solely* because it permitted invocations and benedictions as long as they are student-selected and student-given. Inasmuch as our opinion in *Clear Creek II* specifically relied on the school district's requirement that the student-led graduation prayers be nonsectarian and nonproselytizing in holding that its policy did not offend the Establishment Clause, we find SFISD's reading of *Clear Creek II* to be specious at best.

First, we concluded in *Clear Creek II* that the twin restrictions served the dual functions of enhancing the graduation ceremony's solemnization, thus permitting the policy to clear Lemon's secular purpose hurdle, while simultaneously reducing the possibility of endorsing religion. *Clear Creek II*, 977 F.2d at 971 ("[T]he Resolution imposes two one-word restrictions 'nonsectarian and nonproselytizing' which enhance solemnization and minimize the advancement of religion."). Second, in *Clear Creek II*, we obviously relied on the nonsectarian, nonproselytizing nature of the prayers to determine that the BISD policy did not have the primary effect of advancing religion – *Lemon*'s second prong. *Id.* at 967 ("Its requirement that any invocation be nonsectarian and nonproselytizing minimizes any such advancement of religion."); *see also Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (distinguishing "quintessentially Christian prayer" basketball team prayers from

nonsectarian, nonproselytizing prayers in *Clear Creek II*). Moreover, as the primary-effect prong of Lemon "asks whether . . . the practice under review in fact conveys a message of *endorsement or disapproval*," *Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (emphasis added), the character of the prayer being scrutinized is clearly relevant to the Supreme Court's closely-related Endorsement Test as well. Finally, we rested our determination that the graduation prayers did not constitute a "formal religious exercise" for the purposes of *Lee*'s Coercion Test in principal part on the fact that Clear Creek's policy permitted only nonsectarian, nonproselytizing prayers. *Clear Creek II*, 977 F.2d at 971.

Thus, contrary to SFISD's conclusional suggestion, *Clear Creek II* did not hold that a policy is insulated from constitutional scrutiny under the Establishment Clause merely because it permits, rather than requires, religious speech when selected and given by students.[8] Much more than mere window dressing, the content restrictions that SFISD now attempts to cast aside were, in fact, central to our holding in the *Clear Creek II*.[9] More to the point, we

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[8] In his dissent, Judge Jolly places great emphasis on the fact that the Supreme Court has held that the nonsectarian nature of a graduation prayer cannot resuscitate an otherwise unconstitutional graduation prayer. We do not hold otherwise. Rather, we simply follow *Clear Creek II*'s unmistakable conclusion that, although not sufficient, a policy's nonsectarian, nonproselytizing requirements are necessary.

[9] More generally, it is beyond peradventure that government measures that lend succor to a particular religion, denomination or sect fall at the very core of the conduct

now conclude, in obeisance to the ineluctable precedent of *Clear Creek II*, that a knock-off of a Clear Creek Prayer Policy that does not limit speakers to nonsectarian, nonproselytizing invocations and benedictions violates the dictates of the Establishment Clause.

3. Applying the Tests

Given the posture of this case, we limit our primary discussion to those portions of the Supreme Court's three Establishment Clause tests with regard to which *Clear Creek II* discussed the twin restrictions. Turning first to *Lemon*'s secular purpose requirement, SFISD argues that, as in *Clear Creek II*, its July Policy is designed to solemnize its graduation ceremonies. We are, of course, mindful of the deference courts typically afford a government's articulation of secular purpose. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986); *Clear Creek II*, 977 F.2d at 965-66. Nevertheless, the government's statement of secular purpose cannot be a mere "sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). Here we simply cannot fathom how permitting students to deliver sectarian and

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proscribed by the Establishment Clause. *See, e.g., Larson v. Valente*, 456 U.S. 228, 246 (1982) ("Since *Everson v. Board of Education*, this Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which aid one religion' or that 'prefer one religion over another.' ") (citation omitted); *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (emphasizing neutrality among religious sects is central to Establishment Clause jurisprudence).

proselytizing prayers can possibly be interpreted as furthering a solemnizing effect. Such prayers would alter dramatically the tenor of the ceremony, shifting its focus – at least temporarily – away from the students and the secular purpose of the graduation ceremony to the religious content of the speaker's prayers. Indeed, an almost inevitable consequence of permitting the uttering of such prayers would be the polarizing and politicizing of an event intended to recognize and celebrate the graduating students' academic achievements and the commonality of their presence and the path on which they are about to embark. In short, rather than solemnize a graduation, sectarian and proselytizing prayers would transform the character of the ceremony and conceivably even disrupt it.

The context of the evolutionary history in which SFISD developed its series of prayer policies further confirms the school district's penumbral religious purpose. As described above, SFISD first formulated an "almost" Clear Creek Prayer Policy, one which permitted students to deliver nonsectarian and nonproselytizing prayers (the October Policy); then, following the district court's initial ruling, adopted a "pure" Clear Creek Prayer Policy (the May Policy); and finally, on further reflection, created its ultimate twin-tiered policy (the July Policy), initially dropping the key content restrictions until and unless the district court should hold the primary policy unconstitutional and thereby trigger automatic implementation of the fall-back provision. As students were already permitted to deliver invocations and benedictions (even in the form of prayer) under SFISD's previously articulated policies, it is impossible to conclude that this final revision

was anything but an attempt to encourage sectarian and proselytizing prayers – a purpose which is the antithesis of secular. *See Ingebretsen*, 88 F.3d at 279 (holding school district's policy permitting student-initiated prayer at compulsory or non-compulsory school events did not have secular purpose because (1) its clear intent was to inform students, teachers, and administrators they can pray at school events as long as student "initiated" prayer and (2) policy was passed as part of legislature's reaction to punishment of school president who championed prayer in school). Our cynicism about the school board's proffered secular purpose is galvanized by SFISD's inclusion of the fall-back alternative that would re-insert the twin restrictions *ipso facto* should the district court invalidate the basic provision of the July Policy.

Second, we conclude that, when shorn of the nonsectarian, nonproselytizing restrictions, SFISD's modified Clear Creek Prayer Policy fails Lemon's primary effect prong as well. "The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690, 104 S.Ct. 1355. This consideration is especially important in the context of public schoolchildren. *Aguillard*, 482 U.S. at 583-84, 107 S.Ct. 2573; *cf. Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1048 (5th Cir. 1982) (holding that high school was not public forum and stating "[w]hile students have First Amendment rights to political speech in public school, sensitive Establishment Clause considerations limit their right to air religious doctrines.").

Again, in *Clear Creek II*, we determined that a student-led, nonsectarian, nonproselytizing prayer would serve to solemnize the graduation ceremony and thus would not have the primary effect of advancing religion. *Clear Creek II*, 977 F.2d at 967. As our later cases of *Ingebretsen* and *Duncanville* make abundantly clear, though, the mere fact that prayers are student-led or student-initiated, or both, does not automatically ensure that the prayers do not transgress *Lemon*'s second prong. *Ingebretsen*, 88 F.3d at 279 (holding school district's policy permitting student-initiated prayer at compulsory and non-compulsory school events had primary effect of advancing religion); *Duncanville*, 70 F.3d at 407 (distinguishing *Clear Creek II* and holding school officials' supervision of student-initiated and student-led prayers preceding basketball games violated Establishment Clause, in part because prayers were "quintessentially Christian"). Indeed, if subjecting a prayer policy to a student vote were alone sufficient to ensure the policy's constitutionality, what would keep students from selecting a formal religious representative, such as the rabbi in *Lee*, to present a graduation prayer? Indeed, to take the argument one step further, there would be no reason to deny the students the authority to designate a formal religious representative to deliver a full-fledged, fire-and-brimstone, Bible- or Koran-quoting, sectarian sermonette (in the dress for a prolonged invocation or benediction) at graduation; for, by putting the ultimate choice to the students, the sermonette would not facially bear the government's imprimatur.

But government imprimatur is not so easily masked: Prayers that a school "merely" permits will still be delivered to a government-organized audience, by means of government-owned appliances and equipment, on government-controlled property, at a government-sponsored event, thereby clearly raising substantial Establishment Clause concerns. *Cf. Lee*, 505 U.S. at 597, 112 S.Ct. 2649 (School officials "retain a high degree of control over the precise contents of [a graduation ceremony], the speeches, the timing, the movements, the dress, and the decorum of the students."); *Jones v. Clear Creek Ind. Sch. Dist.*, 930 F.2d 416, 418 (5th Cir. 1991) (*"Clear Creek I"*) (Graduation prayer policy "is subject to Establishment Clause scrutiny because it is the mechanism through which the state provides space in a closed forum for arguably religious speech at a government sponsored event."), *vacated*, 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 831 (11th Cir. 1989) (examining school practice under Establishment Clause "[w]hen religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school-owned facility"). And when the school "permits" sectarian and proselytizing prayers – which, by definition, are designed to reflect, and even convert others to, a particular religious viewpoint and which, as stated above, do not serve (and even run counter to) the permissible secular purpose of solemnizing an event – such "permission" undoubtedly conveys a message not only that the government endorses religion, but that it endorses a particular form of religion.

For the very same reasons, SFISD's prayer policy obviously violates the Supreme Court's Endorsement Test as well, which asks whether the government has appeared to take a position on questions of religious belief or has conveyed a message that religion is favored, preferred, or promoted over other beliefs. *Ingebretsen*, 88 F.3d at 280.

Having concluded that student-selected, student-given, sectarian, proselytizing invocations and benedictions at high school graduations violate both the *Lemon* test and the Endorsement test, we are not required to determine that such public school prayer policies also run afoul of the Coercion Test to hold them antithetical to the Establishment Clause. We nevertheless offer the following observation for the sake of completeness.

As alluded to above, *Clear Creek II* held that the Clear Creek Prayer Policy did not constitute a "formal religious exercise" because (1) the prayers were not delivered by a member of the clergy, and (2) the prayers were nonsectarian and nonproselytizing. *Clear Creek II*, 977 F.2d at 971. Prayer, of course, is a "quintessential religious practice," *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd*, 455 U.S. 913, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1982); and prayer in school raises particularly sensitive constitutional concerns. As the Supreme Court stated in *Aguillard*:

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views

> that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Aguillard, 482 U.S. at 583-84, 107 S.Ct. 2573. Only the combination of the factors relied on in *Clear Creek II* – that the prayer was student-led *and* nonsectarian, nonproselytizing – saved that school district's graduation prayers from being anathematized a "formal religious exercise" for the purposes of *Lee*'s Coercion Test. *Cf. Lee*, 505 U.S. at 588-90, 112 S.Ct. 2649 (holding nonsectarian, nonproselytizing graduation prayer delivered by rabbi was "formal religious exercise"). Again, because sectarian and proselytizing prayers are by their very nature designed to promote a particular religious viewpoint rather than solemnize an otherwise purely secular event, they cannot find sanctuary in the tightly circumscribed safe harbor of *Clear Creek II* and thereby avoid the appellation "formal religious exercise."[10]

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[10] SFISD advances the argument that, because SFISD permits but does not require prayer, such a prayer does not constitute a formal religious exercise. See *Clear Creek II*, 977 F.2d at 971 ("By contrast [to *Lee*], the Resolution tolerated nonsectarian, nonproselytizing prayer, but does not require or favor it."). This contention is wholly unpersuasive, as a religious practice derives its religious nature from its content and historical significance, not from whether it is permitted or required by the school. Neither a baptism nor a bar mitzvah, for examples, would be somehow transformed into a secular events if a school set up a procedure by which its students were permitted to vote to include such a ritual in its graduation ceremony.

Nevertheless, as the Coercion Test is conjunctive and there is no distinguishing difference between SFISD's policy and the policy of Clear Creek ISD in *Clear Creek II* with regard to the test's other two prongs – government direction and obligatory participation – we need not and therefore do not belabor the point by addressing today whether SFISD's policy violates the Coercion Test. It suffices that, when stripped of one of the foundational elements on which *Clear Creek II* is constructed, SFISD's graduation prayer policy is so constitutionally deficient that it cannot stand. By failing to prohibit sectarian and proselytizing prayers, the July Policy not only lacks a secular purpose, but has the primary effect of advancing, and unconstitutionally endorsing religion.

B. The Free Speech Clause

Finding the landscape of Establishment Clause jurisprudence inhospitable, SFISD alternatively seeks sanctuary for its graduation prayer policy in the Free Speech Clause, a contention to which we now turn. SFISD asserts that its July Policy survives constitutional scrutiny because through this policy it has created a "limited public forum." This being the case, continues SFISD, it is not simply permissible for the school district to allow sectarian and proselytizing student prayers, but SFISD would be guilty of unconstitutional viewpoint discrimination were it to do otherwise. We disagree with these assertions for the simple reason that as a matter of law SFISD has not created a limited public forum. *See American Civil Liberties Union of New Jersey v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1477-78 (3d Cir. 1996)

(holding that school board's graduation prayer policy permitting students to vote to include prayer in graduation ceremony did not create limited public forum); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 456-57 (9th Cir. 1994) (same), *vacated as moot*, 515 U.S. 1154, 115 S.Ct. 2604, 132 L.Ed.2d 849 (1995).

We begin with the basics. "There are three classifications of fora." *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992) (quoting *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 343, 87 L.Ed.2d 567 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). The first category is the traditional public forum. These are places, such as public parks and streets, " 'which by long tradition or by government fiat have been devoted to assembly and debate.' " *Id.* (quoting *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439). Second, there is " 'the public forum created by government designation.' " *Id.* This type of forum " 'may be created by government designation of a place or channel of communication [not traditionally open to assembly and debate] for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.' " *Id.* Finally, there is the " 'nonpublic' forum." *Id.* (quoting *Cornelius*, 473 U.S. at 803, 105 S.Ct. 3439). "This is the residual class of government-owned property, to which the First Amendment does not guarantee access." *Id.*

A graduation ceremony is quite obviously not a traditional public forum. The question, therefore, under the July Policy is whether SFISD's commencement program constitutes a government designated public forum, or,

more accurately, whether the portions of the commencement program allocated to the invocation and benediction constitute designated public fora. Two factors are key to determining whether the State has transformed its property into a designated public forum. The first is governmental *intent*. *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439 ("[T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum"). The nature of the State property and its compatibility with expressive activity are important indicia of intent. *Id.* at 802, 105 S.Ct. 3439; *see also Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, ___, 118 S.Ct. 1633, 1639, 140 L.Ed.2d 875 (1998) (holding public television broadcasting not generally a public forum and stating in broadcasting "broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations . . . must exercise to fulfill their journalistic purpose and statutory obligations."); *Muir v. Alabama Educ. Television Com'n*, 688 F.2d 1033, 1042 (5th Cir. 1982) ("A facility is a public forum only if it is designed to provide a general public right of access to its use, or if such public access has historically existed and is not incompatible with the facility's primary activity.").

The second factor relevant to determining whether the government has established a public forum is the extent of the use granted. *See Perry*, 460 U.S. at 46-47, 103 S.Ct. 948. A designated public forum may, of course, be limited to a specified class of speakers or to discussion of specified subjects – thus the term "limited public forum." *Estiverne v. Louisiana State Bar Assoc.*, 863 F.2d 371, 378

(5th Cir. 1989). Nevertheless, the State does not create a designated public forum "by inaction or by *permitting limited discourse.*" *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439 (emphasis added). To create such a forum, the government must allow "general access" to, *Id.* at 802, 105 S.Ct. 3439, or "indiscriminate use" of, *Perry*, 460 U.S. at 47, the forum in question by the general public, or by particular speakers, or for the discussion of designated topics.

Regarding the first factor – governmental intent – it is clear that the government's proffered intent does not govern this inquiry, else it would be a limited inquiry indeed. In the typical case, to justify a limitation it has placed on the speech of private individuals, the State asserts that it has not created a designated public forum. In the instant case, the reverse is true: SFISD attempts to evade the requirements of the Establishment Clause by running for the protective cover of a designated public forum. We must, therefore, view skeptically SFISD's own self-serving assertion of its intent and examine closely the relationship between the objective nature of the venue and its compatibility with expressive activity.

In *Estiverne*, we framed the relevant inquiry as: "Does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance?" *Estiverne*, 863 F.2d at 378-79. SFISD's July Policy flunks this test hands down.

Neither its character nor its history makes the subject graduation ceremony in general or the invocation and

benediction portions in particular appropriate fora for such public discourse. *See Brody v. Spang*, 957 F.2d 1108, 1117 (3d Cir. 1992) ("Graduation ceremonies have never served as forums for public debate or discussions, or as a forum through which to allow varying groups to voice their views.") (quotation and citation omitted); *cf. Hays County Guardian v. Supple*, 969 F.2d 111, 116-18 (5th Cir. 1992) (concluding that university campus was limited public forum because it served as central site of student body and because university's written policies established a "general policy of open access"). For obvious reasons, graduation ceremonies – in particular, the invocation and benediction portions of graduation ceremonies – are not the place for exchanges of dueling presentations on topics of public concern. *See Duncanville*, 70 F.3d at 406 ("The [basketball] games are school-sponsored and controlled events that do not provide any sort of open forum for student expression. . . . "). Such presentations would undoubtedly clash with a ceremony's "primary activity." *See Muir*, 688 F.2d at 1042. Indeed, a graduation ceremony comprises but a single activity which is singular in purpose, the diametric opposite of a debate or other venue for the exchange of competing viewpoints.

It is not surprising then that SFISD has not, in fact, opened the ceremony to such exchanges, which brings us to the second relevant factor – extent of use. In no way can SFISD be said to have granted "general access" to a class speakers at its graduation ceremony. Rather, it has simply concocted a thinly-veiled surrogate process by which a very limited number of speakers – one or two – will be chosen to deliver prayers denominated as invocations and benedictions. These speakers, moreover, will

not be given free reign to address issues, or even a particular issue, of political and social significance. Rather, they will be chosen to deliver very circumscribed statements that under any definition are prayers. *See* Webster's Third New International Dictionary at 1190 (defining "invocation" as "the action or an act of petitioning for help or support") & 203 (defining "benediction," similarly, as "an expression or utterance of blessing or good wishes") (1993). SFISD has thus granted no one, not even the students elected to give the invocations and benedictions, "indiscriminate use" of its government controlled channel of communication. *Perry*, 460 U.S. at 47, 103 S.Ct. 948; *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (holding that school-run student newspaper was not designated forum because school officials "did not evince either by policy or practice any intent to open the pages of [newspaper] to indiscriminate use by its student reporters and editors, or by the student body generally") (quotations and citations omitted).

In short, even though the government may designate a forum only for particular speakers or for the discussion of particular topics, *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439, SFISD's restrictions so shrink the pool of potential speakers and topics that the graduation ceremony cannot possibly be characterized as a public forum – limited or otherwise – at least not without fingers crossed or tongue in cheek. *Cf. Forbes*, 523 U.S. at ___, 118 S.Ct. at 1640 (holding candidate debates constitute narrow exception to general rule that public broadcasting does not constitute public form because (1) *"debate was by design a forum for political speech by candidates,"* and (2) candidate debates

are, by tradition, of exceptional significance in electoral process); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) ("Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and *open to all on equal terms.*") (emphasis added).

Clear Creek II does not hold to the contrary. Although our opinion in that case does advert to *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), which rests, in part, on public forum analysis, *Clear Creek II* does not rely on *Mergens* for the conclusion that the Clear Creek ISD had created a public forum. Rather, *Clear Creek II* adverts to *Mergens* only within the limited context of its Endorsement Test analysis, concluding that the graduation prayer policy at issue "paralleled" the practices held constitutional in *Mergens*.[11] *Clear Creek II*, 977 F.2d at 968-69.

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[11] There is, moreover, a crucial distinction between the speech involved in *Mergens* and the speech that SFISD's policy would allow. In *Mergens*, the Court held that permitting the Christian student organization to meet on school grounds after class and to recruit members through the school newspaper, bulletin boards, and public address system, did not violate the Establishment Clause. Thus, the organization was not permitted to deliver a religious message directly to the student body. The religious organization did not use any of the various methods of communication controlled by the school to proselytize – or to deliver religious messages of any nature – but rather confined such activities to meetings held after class with virtually no trace of governmental imprimatur. *Clear Creek II* took *Mergens* one baby step closer to the brink, allowing delivery of prayer to

Indeed, nowhere in the *Clear Creek II* opinion does the term "public forum" even appear.

This should surprise no one. For, if a graduation program, open, as it is, to such a limited number of student-elected or selected speakers, constitutes a limited public forum, the graduation prayer policy blessed in *Clear Creek II* would, in fact, be *un*constitutional – not, however, as a violation of the Establishment Clause, but as impermissible viewpoint discrimination: Once the State has established a limited public forum, it cannot discriminate against speech because of the message, even if that message is religious in nature. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828-31, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (holding unconstitutional university's decision to deny generally-available school funds to student organization publishing newspaper because of newspaper's Christian editorial viewpoint); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-96, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (holding unconstitutional school's policy of denying school facilities to group desiring to show film series addressing child-rearing questions from a "Christian perspective" as impermissible viewpoint discrimination). Thus, if public forum analysis were applicable, then Clear Creek's proscription of prayer that is sectarian and proselytizing would violate the First Amendment after all, but

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the student body but only if such prayer were nonsectarian and nonproselytizing. SFISD's July Policy, however, would plunge over the cliff, by permitting students to present overtly sectarian and proselytizing religious prayers to a group of students clearly assembled at the behest of the government.

would do so on grounds we never considered in *Clear Creek II*.[12]

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[12] Judge Jolly accuses us of unprecedentedly permitting the government to review (and thus control) the content of citizens' purely private speech (in the form of prayer) to determine whether that speech transgresses the required nonsectarian, nonproselytizing restrictions. Judge Jolly's accusation, however, only serves to highlight that *Clear Creek II* did not hold that the school district had created a public forum. In that decision, we explicitly approved a school district's review of the content of the student-initiated, student-led graduation prayers. *Clear Creek II*, 977 F.2d at 967 ("We know of no authority that holds yearly review of unsolicited material for sectarianism and proselytization to constitute excessive entanglement."). Judge Jolly is thus faced with a dilemma – either, contrary to his assertions, we did not hold in *Clear Creek II* that the school district created a public forum or, as Judge Jolly argues, we did so hold, but additionally approved the type of governmental review he now condemns.

Because (1) we do not believe that the student-initiated, student-led invocation and benediction portions of a graduation ceremony satisfy the requirements of a public forum, (2) the *Clear Creek II* opinion never once utters the term "public forum" despite its consideration of *Mergens*, a public forum case, and (3) the *Clear Creek II* opinion explicitly approves the school district's review of the students' graduation prayers for sectarianism and proselytization, a review that would undoubtedly constitute impermissible viewpoint discrimination if the students' graduation prayers constituted purely private speech, we will not, as Judge Jolly urges, strain to read our earlier decision to hold contrary to its plain language that the school district had carved out a limited public forum. Whether or not we agree with *Clear Creek II*'s conclusion that the student-led graduation prayers do not transgress the Establishment Clause even though they do not constitute private speech, we are bound by its judgment unless and until this Court reconsiders the matter en banc or the Supreme Court holds otherwise.

In sum, our *Clear Creek II* opinion explicitly – and (we are bound by stare decisis to acknowledge) correctly – relies on Clear Creek ISD's nonsectarian, nonproselytizing restrictions to dodge the outcome otherwise dictated by *Lee*. Without these twin restrictions, a Clear Creek Prayer Policy cannot withstand constitutional scrutiny. Moreover, SFISD cannot escape this result by piously wrapping itself in the false banner of "limited public forum." The July Policy created no forum at all and therefore could not, and did not, trigger the First Amendment's prohibition of viewpoint discrimination. The limited number of speakers, the monolithically noncontroversial nature of graduation ceremonies, and the tightly restricted and highly controlled form of "speech" involved, all militate against labeling such ceremonies as public fora of any type. Absent feathers, webbed feet, a bill, and a quack, this bird just ain't a duck!

The district court, therefore, did not err in rejecting SFISD's stretch to reach limited public forum status for its graduation and through it find viability for the July Policy in the Free Speech Clause. Neither did the court err in holding that provisions of the initial paragraph of SFISD's July Policy violates the Establishment Clause or in ordering SFISD to institute the fall-back alternative – a pure Clear Creek Prayer Policy – in its stead. We need only note briefly that the district court did, however, clearly err in overbroadly defining "nonsectarian" to include reference to specific "deities," *see, e.g.*, Webster's Third New International Dictionary at 1538 (defining "nonsectarian" as "not restricted to or dominated by a particular religious group"), a mistake the district court

can easily correct on remand. A nonsectarian, nonproselytizing prayer that, for example, invokes the name of Buddha or Mohammed or Jesus or Jehovah is an obvious oxymoron.

C. Football Games

Having concluded that SFISD's modified Clear Creek Prayer Policy does not pass constitutional muster, we must next address whether the pure Clear Creek Prayer Policy embodied in the alternative fall-back provision of the policy can be extended to football games through the Football Policy. In *Duncanville*, we confronted virtually the identical issue. There, the district court had enjoined employees of the school district from, *inter alia*, supervising student-initiated, student-led prayers during athletic events. *Duncanville*, 70 F.3d at 406. In upholding the injunction, we distinguished *Clear Creek II*, stating:

> In concluding that [the Clear Creek] resolution did not violate the Establishment Clause, we emphasized that high school graduation is a significant, once-in-a-lifetime event that could appropriately be marked with a prayer, that the students involved were mature high school seniors and the challenged prayer was to be non-sectarian and non-proselytizing. Here, we are dealing with a setting [football and basketball games] far less solemn and extraordinary, a quintessentially Christian prayer, and students of twelve years of age. . . . *Id.*

SFISD argues that the present case is more closely analogous to *Clear Creek II* than to *Duncanville* because in the latter the students spontaneously initiated the prayers

in question, whereas here, as in *Clear Creek II*, they do so by vote. SFISD's argument, however, widely misses the mark. The controlling feature here is the same as in *Duncanville:* The prayers are to be delivered *at football games* – hardly the sober type of annual event that can be appropriately solemnized with prayer. The distinction to which SFISD points is simply one without difference. Regardless of whether the prayers are selected by vote or spontaneously initiated at these frequently-recurring, informal, school-sponsored events, school officials are present and have the authority to stop the prayers. Thus, as we indicated in *Duncanville*, our decision in *Clear Creek II* hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek Prayer Policy cannot survive. We therefore reverse the district court's holding that SFISD's alternative Clear Creek Prayer Policy can be extended to football games, irrespective of the presence of the nonsectarian, nonproselytizing restrictions. *See Jager*, 862 F.2d at 832-33 (holding "equal access" policy for football game invocations unconstitutional).

D. Injunctive Relief

Turning next to the Does' equitable claim, we review the district court's denial of an injunction for abuse of discretion. *Lubbock*, 669 F.2d at 1049. As we agree with the district court that it can simply order SFISD to put into effect the fall-back alternative of the July Policy, we address only whether the Does are entitled to injunctive relief regarding SFISD's other practices. The district court expressly found that SFISD had ceased all such unlawful practices. Given a trial court's greater ability to evaluate

the evidence regarding a defendant's future propensity to engage in proscribed activities, we are generally reluctant to overturn a denial of injunctive relief. *Id.* (refusing to reverse trial court's denial of injunctive relief even though defendant had engaged in impermissible practices over several years and only ceased on eve of trial); *Meltzer v. Board of Pub. Instruction of Orange County*, 548 F.2d 559, 562-568 (5th Cir. 1977) (refusing to reverse district court's denial of injunctive relief even though school district had proved very reluctant to comply with constitutional requirements of Establishment Clause), *aff'd on rehearing*, 577 F.2d 311 (1978). The Does, moreover, point to no evidence in support of their contention that a threat of future unconstitutional practices exists other than the fact of SFISD's removal of the "nonsectarian, nonproselytizing" language from its final graduation and football game policies, a threat negated by the district court in ordering implementation of the fall-back alternative and extinguished by us in this appeal. We therefore conclude that the district court's denial of injunctive relief was not an abuse of discretion.

E. Attorney's Fees

Under § 1988, the district court may make an award of attorney's fees only if it determines that the claimant is a "prevailing party." *Walker v. HUD*, 99 F.3d 761, 767 (5th Cir. 1996); *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). A party prevails when he succeeds on "any significant issue in litigation which achieve[s] some of the benefit [he] sought in bringing suit." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989)

(quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Id.* at 792-93, 109 S.Ct. 1486.

In this case, the Does have obtained a judgment vindicating the Santa Fe students' important First Amendment rights in both graduation ceremony and football game contexts. They "have thus served the 'private attorney general' role which Congress meant to promote in enacting § 1988." *Garland*, 489 U.S. at 793, 109 S.Ct. 1486; *see also Hall v. Board of Sch. Comm'rs of Conecuh County*, 656 F.2d 999, 1003 (5th Cir. 1981) (holding plaintiffs who prevailed on claims that high school's morning devotional readings over public address system and teaching elective Bible literature course were violative of Establishment Clause were entitled to attorney's fees). Accordingly, on remand the district court shall award the Does reasonable and realistic attorney's fees as prevailing parties.

F. Monetary Damages

Addressing next Jane Doe II's appeal from the denial of damages for the David Wilson "Mormon" incident, we need do no more than simply state our agreement with the district court's assessment of the evidence on that point. Regardless of the outcome of the question whether SFISD truly had a policy of tolerating Establishment Clause abuses, our independent review of the summary judgment record leaves us with no doubt that it is simply devoid of evidence establishing a genuine dispute of

material fact that Jane Doe II suffered any compensable harm stemming from Wilson's insensitive and misguided conduct. *See Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 940 (5th Cir. 1996) (requiring that the evidence "manifest[ ] some specific discernable injury to the claimant's emotional state"), *cert. denied*, 519 U.S. 1091, 117 S.Ct. 767, 136 L.Ed.2d 713 (1997).

G. Toleration of Establishment Clause Violations

Finally, because we do not disturb the district court's rulings on damages and because we base our decision that the Does are entitled to attorney's fees on our holdings regarding SFISD's graduation and football game prayer policies – not on a finding that SFISD had a policy of tolerating Establishment Clause violations – we need not consider SFISD's challenge to the district court's summary judgment ruling on liability for past Establishment Clause violations.

III

CONCLUSION

For the foregoing reasons, we (1) AFFIRM the district court's ruling that the words "nonsectarian, nonproselytizing" are constitutionally necessary components of a viable Clear Creek Prayer Policy; (2) REVERSE that court's holding that SFISD's Clear Creek Prayer Policy can permissibly extend to prayers before (or after) football games; (3) AFFIRM the court's judgment that neither damages nor injunctive relief are appropriate in this case; and (4) REVERSE the district court's denial of attorney's

fees for the Does and REMAND this case for determination of reasonable attorney's fees and an award of such fees to the Does, consistent with this opinion.

AFFIRMED in part; REVERSED in part; and REVERSED and REMANDED in part, with instructions.

APPENDIX B

E. GRADY JOLLY, Circuit Judge, dissenting:

Today, for the first time in our court's history, the majority expressly exerts control over the content of its citizens' prayers. And it does so notwithstanding that the Supreme Court has never required, suggested, hinted, or implied that the Constitution controls the *content* of citizens' prayers in any context. To the contrary, Supreme Court precedent clearly indicates that the majority's view transgresses the most fundamental First Amendment rights. I therefore respectfully dissent.

I

The majority's exegesis contains two primary flaws that allow it to free fall into the black pit of the constitutionally forbidden, that school districts must control the content of graduation prayers to assure that they are "nonsectarian and nonproselytizing."[1] First, the majority

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[1] The nonsectarian, nonproselytizing restriction constitutes viewpoint, not subject matter, discrimination. Such a restriction clearly allows the subject matter of religion, or ultimate reality, to enter the graduation ceremony. The majority does not, and indeed could not, disagree with this characterization. *See generally Rosenberger v. Rectors and Visitors of the Univ. of Virginia*, 515 U.S. 819, 830-31, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *see also Chaudhuri v. Tennessee*, 130 F.3d 232, 237 (6th Cir. 1997) (noting that the nonsectarian prayer at issue "evoke[s] a monotheistic tradition not shared" by some religious peoples, including Hindus), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1308, 140 L.Ed.2d 473 (1998). Furthermore, it is instructive to note that the term "proselytize" is simply a word used – sometimes pejoratively – in lieu of the term "persuade." *See* Webster's

reads *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992)[2] in a way that openly oppugns the Supreme Court's reasoning in *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).[3] The Court in Lee clearly held that the nonsectarian nature of a graduation prayer cannot save an otherwise unconstitutional graduation policy from the Establishment Clause. Yet in the face of this holding, the majority nevertheless audaciously concludes that a "nonsectarian, nonproselytizing" requirement constitutes a necessary element to our court's decision upholding the graduation policy in *Clear Creek II*.

The majority makes its second mistake by failing to recognize that the government may not restrict religious speech based on viewpoint when the government has created a forum for the expression of privately held

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Third New International Dictionary at 1821 (defining the verb "proselyte" as "to convert from one religion, belief, opinion, or party to another"). Free market enthusiasts and environmentalists can attempt to "proselytize" as well as Baptists and Mormons.

[2] As a point of nomenclature, our court has in the past referred to this case as *Jones II*. *See, e.g., Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 405 (5th Cir. 1995); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278 (5th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 388, 136 L.Ed.2d 304 (1996). I join the majority in at least one of several breaks with precedent and refer to the case as *Clear Creek II*.

[3] The majority omits any mention of the fact that the Supreme Court vacated our decision in *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991) (*Clear Creek I*), *vacated*, 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992), and specifically instructed our court to reconsider the case in the light of *Lee*. This is the context in which we issued our *Clear Creek II* opinion.

views.[4] This mistake leads the majority to reach a conclusion, which, however handy and expedient it may be, frustrates the neutral accommodation of religious viewpoints. When the government restricts sectarian and proselytizing religious speech, while embracing ecumenical religious speech, the government has engaged in illegitimate, viewpoint discrimination. That is why the Free Speech Clause is violated when the majority forces a nonsectarian, nonproselytizing requirement upon the speakers. In short, the majority's control over the content of students' prayers achieves the jurisprudentially rare

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[4] This mistake is, undoubtedly, a product of the majority's decision to treat the Free Speech Clause as an isolated afterthought. By first engaging in a separate Establishment Clause analysis, the majority virtually preordains the outcome before it addresses the Free Speech Clause. This approach fails to acknowledge the complex interaction of the Free Exercise, Establishment, and Free Speech Clauses. One prominent First Amendment scholar has described the source of this complexity in the following way:

> The central feature of the constitutional law of speech and press is a prohibition on "content-based" discrimination, except in the most compelling of circumstances. Yet the distinction between religion and nonreligious ideologies and institutions – a distinction seemingly demanded by the very text of the Religion Clauses – is based on the content of ideas and beliefs. The content-neutral thrust of the Free Speech Clause thus coexists uneasily with the special status of religion under the Free Exercise and Establishment Clauses.

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 118 (1992).

result of offending not only one, but three provisions within the First Amendment.[5]

II

Let me try to fit this case into the context of our precedent. The question before us is, quite simply, what was it about the *Clear Creek II* policy that allowed it to escape the result in *Lee*? To put the question another way, is it enough for an invocation to be student-elected and student-given, or is the addition of a "nonsectarian, nonproselytizing" content limitation required in order to pass constitutional muster? The majority makes the unprecedented assumption that the content of a speaker's prayer – specifically, whether the prayer is sectarian or persuasive – can have some effect on its status under the Establishment Clause. Jurists cannot draw many categorical conclusions about the Supreme Court's treatment of the Establishment Clause. Nevertheless, the majority's assumption has the vice of offending one immutable holding of the Court's Establishment Clause jurisprudence: The government may not mitigate Establishment Clause concerns by requiring prayers to be nonsectarian and nonproselytizing. I can locate no place in the Court's extensive Establishment Clause jurisprudence for a "nonsectarian, nonproselytizing" exception to the Clause's command. The additional verbiage was therefore unnecessary in upholding the graduation policy in *Clear Creek II*.

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[5] These three provisions, read together, state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . " U.S. CONST. amend. I.

A

I begin with some first principles. From its earliest forays into interpretation of the Establishment Clause, the Court consistently characterized it as prohibiting more than the direct establishment of a single national (or, after *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), and *Everson v. Board of Educ.*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), state) church. *See, e.g., Davis v. Beason*, 133 U.S. 333, 342, 10 S.Ct. 299, 33 L.Ed. 637 (1890) (noting that "[t]he first amendment to the Constitution . . . was intended . . . to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect"); *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 164, 25 L.Ed. 244 (1878) (holding that "Congress was deprived of all legislative power over [religious] opinion" by the Clause); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730, 20 L.Ed. 666 (1871) (noting that the Clause serves both to " 'rescue[ ] the temporal institutions from religious interference,' " and to " 'secure[ ] religious liberty from the invasion of the civil authority' ") (quoting *Harmon v. Dreher*, 17 S.C. Eq. (Speer's Eq.) 87, 120 (S.C. 1843)); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52, 3 L.Ed. 650 (1815).

The Court's modern jurisprudence has continued the tradition set by the early cases, and makes clear that the Establishment Clause paints in broad prohibitive strokes when it comes to state or federal action in the spiritual domain. As Justice Black explained in *Everson*:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one

> religion, aid all religions, or prefer one religion over another. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

330 U.S. at 15-16, 67 S.Ct. 504; *see also Lee*, 505 U.S. at 602, 112 S.Ct. 2649 (Blackmun, J., joined by Stevens & O'Connor, JJ., concurring) (noting that the modern Court " 'has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof' ") (quoting *School Dist. v. Schempp*, 374 U.S. 203, 222, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)).

In *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), this broadly proscriptive reading of the Establishment Clause was applied for the first time to the particularly sensitive area of school prayer. The controversy concerned a short prayer selected by the State Board of Regents for students to read aloud at the beginning of the school day.[6] Stating that "[n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause," the Supreme Court struck it down as an unconstitutional attempt by the State to use "the power, prestige and financial support of government" to

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[6] The prayer read in full: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." 370 U.S. at 422, 82 S.Ct. 1261.

exert "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion." *Engel*, 370 U.S. at 430-31, 82 S.Ct. 1261. But for today's majority, not to worry.

B

Yet *Lee*, the most recent and relevant precedent, continues to maintain and extends this broadly proscriptive reading of the Clause, and refutes the notion that a government-sponsored, "nonsectarian, nonproselytizing" prayer might be any less constitutionally deficient than a sectarian, proselytizing one. Addressing the almost identical contention in that case – that the invocation at issue was constitutionally sound because the school directed it to be nonsectarian and nonproselytizing – the Court stated:

> We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit reference to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation, to the statement . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. . . . Though the efforts of the school officials in this case to find common

> ground appear to have been a good-faith attempt to recognize the common aspects of religions and not the divisive ones, our precedents . . . caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. *The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.*

505 U.S. at 589-90, 112 S.Ct. 2649 (emphasis added). Today's majority opinion lacks any attempt to address this authoritative reasoning, which seems to be so at odds with its holding.[7] However, like boys on a summer night blithely whistling as they walk through a graveyard, for the panel majority it is not to worry so long as it is brave enough to look straight ahead and pretend that authoritative precedents are merely ghosts of the past not to be feared.

Indeed, the majority's opinion reveals a willful aversion to accommodating the respective reasoning of *Lee* and *Clear Creek II*. *See, e.g.*, ante at 821 (finding that the district court judge "clearly err[ed]" in defining nonsectarian to include reference to "specific deities" when *Clear Creek II*, 977 F.2d at 967, upheld a policy under which students may "employ the name of any deity"); ante at

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[7] Baffling indeed is the majority's "cf." citation, ante at 817, to pages 588-90 of *Lee*. In those pages, the Court explicitly rejects the idea that the nonsectarian nature of a prayer mitigates any Establishment Clause problems.

818 (relying on another circuit's case that expressly disagreed with our own *Clear Creek II* precedent, and doing so in the midst of explaining why the reasoning of *Clear Creek II* could not possibly rest on the fact that the policy created a limited public forum); ante at 821 n.11 (describing *Clear Creek II* as a case taking our First Amendment jurisprudence one step closer to the brink of a cliff); ante at 815 (feigning "obeisance to the ineluctable precedent of *Clear Creek II*"). To avoid the real issues presented in this case, the majority must paper over the unmistakable language in cases like *Lee* and *Engel*. It is beyond argument, however, that the Supreme Court's consistent interpretation of the Establishment Clause allows no exception for the nonsectarian and nonproselytizing prayer. The Clause prohibits the establishment of religion and, as interpreted by the Supreme Court, it denies government the ability to favor a composite ecumenical religion just as surely as it denies the ability to favor some select one of its components. The majority's contention that the words "nonsectarian, nonproselytizing" could somehow save an otherwise unconstitutional policy in this case is a regrettable expediency.[8]

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[8] And despite any implications in *Clear Creek II* to the contrary. Although we did note in *Clear Creek II* that having a nonsectarian, nonproselytizing requirement might serve to "minimize any . . . advancement of religion," the argument was clearly cumulative in nature. *See id.*, 977 F.2d at 967. Furthermore, the point was made exclusively in the context of one prong of the *Lemon* test. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Although the Supreme Court has yet specifically to overrule *Lemon*, *see Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 & n.7, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), a strict application

III

Furthermore, the inclusion of a "nonsectarian, non-proselytizing" content limitation offends a particularly

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of the case is of doubtful continuing relevance in this context, having been largely abandoned in favor of the "coercion" and "endorsement" tests of *Lee* and *Allegheny*.

In *Lee*, for example, the Court struck down the graduation prayer policy at issue on the sole basis that it was an unconstitutional coercion of participation in a religious exercise. *See id.*, 505 U.S. at 599, 112 S.Ct. 2649. Two concurrences would have found an unconstitutional endorsement as well, *see id.* at 604-05, 112 S.Ct. 2649 (Blackmun, J., joined by Stevens & O'Connor, JJ., concurring); *id.* at 630-31, 112 S.Ct. 2649 (Souter, J., joined by Stevens & O'Connor, JJ., concurring), but only three Justices, O'Connor, Stevens, and the since-departed Justice Blackmun, bothered to so much as recite the elements of the *Lemon* test. *See id.* at 602-03 & n.4, 91 S.Ct. 2105. Even this limited acknowledgment was ambivalent, however, as the discussion that followed addressed the sole question whether the government " 'plac[ed] its official stamp of approval' on the prayer" – and that is just the endorsement test rephrased. *See id.* at 603, 91 S.Ct. 2105 (quoting *Engel*, 370 U.S. at 429, 82 S.Ct. 1261). The dissenters in *Lee* would have found no constitutional fault at all based on a historical/coercion approach to the problem, *see id.* at 632-46, 112 S.Ct. 2649 (Scalia, J., joined by Rehnquist, CJ., and White & Thomas, JJ., dissenting), which prompted Justice Scalia to declare that "[t]he Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it . . . and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision." *Id.* at 644, 91 S.Ct. 2105. *See also Rosenberger*, 515 U.S. at 837-46, 115 S.Ct. 2510 (omitting any mention of *Lemon* whatsoever when analyzing an Establishment Clause challenge).

Even before *Lee*, however, *Lemon* had long since been pushed into a small corner of the Court's jurisprudence. In both *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), and *Board of Educ. of Westside Community*

longstanding and independent constitutional doctrine upon which the *Clear Creek II* decision must and does rely: the principle of neutral accommodation.

Schools v. Mergens, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), the Court's two most significant Establishment Clause cases leading up to *Lee*, the *Lemon* test failed to command a majority. As in *Lee*, the primary analysis of each majority, plurality, concurring, and dissenting opinion in those cases ultimately turned on the principles of endorsement and/or coercion – not on any strict application of the *Lemon* test. *See Allegheny*, 492 U.S. at 593-94, 109 S.Ct. 3086 (stating that "[w]hether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same . . . [t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief"); *id.* at 627, 109 S.Ct. 3086 (O'Connor, J., joined in part by Brennan & Stevens, JJ., concurring in part and in the judgment) (stating that "the endorsement test captures the essential command of the Establishment Clause"); *id.* at 638, 109 S.Ct. 3086 (Brennan, J., joined by Marshall & Stevens, JJ., concurring in part and dissenting in part) (agreeing that the Establishment Clause should be interpreted to assure that government neither "signals an endorsement of" nor "shows favoritism towards" religion); *id.* at 650, 109 S.Ct. 3086 (Stevens, J., joined by Brennan & Marshall, JJ., concurring in part and dissenting in part) (noting that "[w]hether the vice . . . is characterized as 'coercion,' or 'endorsement,' or merely as state action with the purpose and effect of providing support for specific faiths, it is common ground that . . . symbolic government speech 'respecting an establishment of religion' may violate the Constitution") (citations omitted); *id.* at 655-79, 109 S.Ct. 3086 (Kennedy, J., joined by Rehnquist, CJ., and White & Scalia, JJ., concurring in the judgment in part and dissenting in part) (advancing the coercion test); *Mergens*, 496 U.S. at 250, 110 S.Ct. 2356 (finding the Equal Access Act, 20 U.S.C. § 4071 et seq., constitutional because "secondary students are . . . likely to

A

In *Everson*, Justice Black expressly noted that the courts must "be sure that [they] do not inadvertently

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understand that a school does not endorse or support student [religious] speech that it merely permits on a nondiscriminatory basis"); *id.* at 260-61, 110 S.Ct. 2356 (Kennedy, J., joined by Scalia, J., concurring in part and in the judgment) (finding the Act constitutional on the basis that "[n]othing on the face of the Act or in the facts of the case . . . demonstrates that enforcement of the statute will result in the coercion of any student to participate in a religious activity"); *id.* at 266, 110 S.Ct. 2356 (Marshall, J., joined by Brennan, J., concurring in the judgment) (noting concern for the "appearance of school endorsement" of religious views caused by the procedures permitted under the Act); *id.* at 287, 110 S.Ct. 2356 (Stevens, J., dissenting) (not reaching the constitutional issue, but noting endorsement and coercion concerns).

Finally, Justice Scalia's assessment of *Lee*'s effect on *Lemon* has been sanctioned by another (post-*Lamb's Chapel*) panel of this court. *See Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993) (eschewing "*Lemon* analysis in favor of a more case-bound approach" because, although normally " 'it is neither [this court's] object nor [its] place to opine whether the Court's Establishment Clause jurisprudence is good, fair, or useful,' . . . recent indications suggest that the Court agrees with [a terminal] assessment of *Lemon*, essentially ignoring it in *Lee* in favor of the school prayer cases") (quoting *Jones*, 977 F.2d at 966, and citing to Justice Scalia's dissent in *Lee*); *see also Bauchman v. West High School*, 132 F.3d 542, 551-52 (10th Cir. 1997) ("Justice O'Connor's 'endorsement test' is now widely accepted as the controlling analytical framework for evaluating Establishment Clause claims."), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2370, 141 L.Ed.2d 738 (1998); *but see Helms v. Picard*, 151 F.3d 347, 362 (5th Cir. 1998) ("[T]he Supreme Court has not abandoned, nor even fundamentally changed, the *Lemon* test."), *amended* 165 F.3d 311 (5th Cir. 1999).

prohibit [government] from extending its general . . . benefits to all . . . citizens without regard to their religious belief" by being overzealous in their enforcement of the Establishment Clause. 330 U.S. at 16, 67 S.Ct. 504. This concern was explicated with some eloquence by Justice Douglas in the following case of *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952):

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal

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Even if the Supreme Court has not yet effectively abandoned the *Lemon* test, the majority's insistence that schools bar sectarian and proselytizing prayers would surely fail *Lemon*'s excessive entanglement test. *Compare, Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d at 279 (to the extent that a statute requires school officials to review the content of prayers to ensure that they meet nonsectarian and nonproselytizing requirements, that statute excessively entangles government with religion); *Lee*, 505 U.S. at 617, 112 S.Ct. 2649 (Souter, J., concurring) (describing as "undefinable" the point at which a state-approved, ecumenical prayer becomes so closely identified with the sacred text of a specific religion that a breach of the Establishment Clause has occurred); *and Widmar v. Vincent*, 454 U.S. 263, 272 n.11, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (finding that a university would entangle itself with religion by attempting to exclude "religious speech" because enforcing that exclusion would require officials to distinguish between religious and nonreligious speech); *with Clear Creek II*, 977 F.2d at 968 (stating that "we know of no authority that holds yearly review of unsolicited material for sectarianism and proselytization to constitute excessive entanglement").

> of its adherents and the appeal of its dogma. When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

343 U.S. at 313-14, 72 S.Ct. 679; *see also Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973) (stating that "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion"); *Wallace v. Jaffree*, 472 U.S. 38, 60, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (interpreting the Clause, similarly, as requiring government to "pursue a course of complete neutrality toward religion").

Adapting this "neutral accommodation" principle to the scholastic setting, in *Widmar v. Vincent*, 454 U.S. 263, 273-74, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), the Court

held that it was not a violation of the Establishment Clause for a public university to allow a religious student group to take advantage of the university's general policy of allowing registered student groups to use university facilities for their meetings on a neutral and nondiscriminatory basis. Reasoning that the university had created a designated public forum by making the facilities "generally open for use by student groups," the Court clarified that, in general, "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices" that make use of the forum. *Id.* at 267, 274, 102 S.Ct. 269.

Following up on *Widmar*, in 1984, Congress enacted the Equal Access Act, 20 U.S.C. § 4071 et seq., to make the neutral accommodation principle expressly applicable to the secondary public schools. Upholding the Act as constitutional under the Establishment Clause, the Court noted in *Mergens* that:

> [T]here is a crucial distinction between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support [religious] student speech that it merely permits on a nondiscriminatory basis. The proposition that schools do not endorse everything they fail to censor is not complicated.

496 U.S. at 250, 110 S.Ct. 2356 (citations omitted). The majority fails to appreciate this "crucial distinction"

between government speech endorsing religion and private speech endorsing religion when it reads *Clear Creek II* as requiring school policies to adopt the nonsectarian, nonproselytizing requirements.

B

This distinction was not lost on the *Clear Creek II* panel. *Clear Creek II* is indeed a case about neutral accommodation, and relies on a central principle of Establishment Clause jurisprudence.[9] In upholding the policy

[9] This principle of neutral accommodation is fully consistent with and anticipated by *Lee*, *see id.*, 505 U.S. at 598-99, 112 S.Ct. 2649 ("We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.") (citing *Mergens*); *id.* at 630 n.8, 112 S.Ct. 2649 (Souter, J., joined by Stevens & O'Connor, JJ., concurring) ("If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement to the State."), and has been both sustained and augmented by the Court's more recent cases. *See, e.g.*, *Rosenberger*, 515 U.S. at 842, 115 S.Ct. 2510 (stating, once again, that "[i]t does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups which use meeting rooms for sectarian activities"); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 766, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (plurality) ("Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."); *Board of Education v. Grumet*, 512 U.S. 687, 696, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (" 'A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents.") (quoting *Nyquist*, 413 U.S. at 792-93, 93 S.Ct. 2955); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) (noting that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge," for, if the reverse were true, "then 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair' ") (quoting *Widmar*, 454 U.S. at 274-75, 102 S.Ct. 269).

under consideration in *Clear Creek II*, we expressly noted that, "unlike the policy at issue in *Lee*, [the *Clear Creek II* policy] does not mandate a prayer." 977 F.2d at 968. Although conceding that the policy allows for "supplications to a deity," we clarified that it also "permits invocations free of all religious content." *Id.* at 969.[10] Relying expressly on *Mergens*'s proposition that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," we concluded that the

[10] On this point, it is important to note that *Clear Creek II* clearly rests on an interpretation of "invocation" and "benediction" that is itself free of all religious content. *Clear Creek II*, 977 F.2d at 969. This fact goes some way towards distinguishing the result in *Clear Creek II* from the contrary decision of the Third Circuit in *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (en banc), where the challenged policy provided for a student-elected, student-given, "invocation and benediction *prayer*." *Id.* at 1475 (emphasis added).

policy was an essentially neutral directive of accommodation for private religious and other speech that neither favored nor disfavored religion on its face, and was therefore not unconstitutional. *Id.*

C

Because it is clear that *Clear Creek II* relies on *Mergens*'s neutral accommodation principle to escape the proscriptive effect of *Lee*, we need only apply that principle to the facts before us.

1

We have expressly stated that for the Constitution to require neutral accommodation of religious speech, the government must have established at least what has been called a "limited public forum." *Duncanville*, 994 F.2d at 164-65.[11] As the majority points out, a "limited public forum" is one of several types of fora recognized by the Supreme Court. The other categories of fora include traditional public, designated public, and nonpublic fora. The majority errs, however, by failing to understand the difference between a "designated public forum" and a "limited public forum." The government creates a designated public forum when it "has intentionally designated a place or means of communication as a public forum." *Cornelius*, 473 U.S. at 800, 105 S.Ct. 3439. A subset of

[11] *But see Lamb's Chapel*, 508 U.S. at 392-93, 113 S.Ct. 2141 (suggesting, prior to our decision in *Duncanville*, that even in a nonpublic forum, the neutral accommodation principle applies).

designated public fora is the "limited public forum." Such a forum is created when the government limits the purpose of the forum by, for example, placing a limitation on use by certain groups or on the discussion of certain subjects. *Perry*, 460 U.S. at 45 n.7, 103 S.Ct. 948; *Brody v. Spang*, 957 F.2d 1108, 1118 (3d Cir. 1992) (describing a limited public forum as "a subset type of forum, whose scope is circumscribed either by subject matter or category of speaker"); *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, 692 (2d Cir. 1991) (describing a limited public forum as a sub-category of the designated forum that the government creates when it opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects).

SFISD's policy only limits the benedictions or invocations by limiting the potential class of speakers to graduating students. Contrary to the majority's assertion, the policy in this facial challenge does not require that the messages have a religious component. Neither the dictionary definitions cited by the majority, ante at 819-820, nor our own precedents require an interpretation of "invocation" or "benediction" grounded in religion. *See Clear Creek II*, 977 F.2d at 969 (interpreting the terms "invocation" and "benediction" in a way that is free from all religious content). Furthermore, SFISD's policy grants absolute access to the graduation podium to any student speaker that the senior class elects; once the class of elected student speakers is chosen, SFISD maintains no power, discretionary or otherwise, to bar any duly chosen speaker from accomplishing his task. Because the policy effectuates this relinquishment of control, the policy

unmistakably creates a limited public forum and the majority cannot make it otherwise.

In arguing that SFISD has not created a "true" forum, the majority states its *ex cathedra* view that a graduation ceremony is not an appropriate place for communication of views on issues of political and social significance. Ante at 819. Historical facts, of course, contradict the majority's view. While graduation ceremonies do not often exhibit "duelling presentations," they almost always include speakers attempting to impart wisdom and reflect on life's higher (that is, morally superior) goals. Furthermore, graduation ceremonies often play host to controversial public figures. *See, e.g.*, Lydia Lum, *Commencement Time Begins as Politicians Head List of Speakers*, HOUSTON CHRONICLE, May 4, 1998, at 16 (stating that "commencement speakers . . . vary from year to year, but 1998 apparently is the Year of the Politician."). Finally, our country's public schools have, of course, a long tradition of hosting religious prayers at graduation ceremonies. *Lee*, 505 U.S. at 635-36, 112 S.Ct. 2649 (Scalia, J., dissenting). In sum, graduation ceremonies have often presented a forum for expressing the most profound of thoughts on society, politics, religion, and the nature of humankind.[12]

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[12] The majority cites only one case in support of its rigid view that a graduation ceremony (or portions thereof) could not constitute a public forum. In its citation of, and quotation from, that case the majority takes more liberties than should be allowable. In quoting *Brody v. Spang*, the majority panhandles a remote district court's musings as Third Circuit law without proper attribution. The quotation reads,

> Graduation ceremonies have never served as forums for public debate or discussions, or as a forum through which to allow varying groups to voice their views.

Ante at 819 (quoting *Brody v. Spang*, 957 F.2d 1108, 1119-20 (3d Cir. 1992) (quoting *Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989)). But the *Brody* court did not indicate any agreement in quoting the Iowa district court. In fact, the *Brody* court followed its discussion of *Lundberg* with the following statement:

> Nonetheless, it is certainly possible that the commencement exercises at Downingtown Senior High School could qualify as a public forum, and nothing in the present record demonstrates otherwise. More specifically, although the terms of the consent decree [at issue in this case] suggest that the pool of potential graduation speakers is confined to members of the school community and invited guests, this simply indicates that any forum created is a limited one, and does not preclude a finding that the ceremony has been designated as a public forum.

Brody, 957 F.2d at 1120 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988)).

Besides its failure to properly distinguish between designated and limited public fora, the majority further errs by applying precedent that is inapplicable to the case at hand. The cases upon which the majority relies for guidance in its forum analysis – *Cornelius, Perry, Forbes, Estiverne, Muir* and *Hobbs* – all dealt with "as-applied" challenges in which the defendants (governmental entities) applied their policies to bar forum access to those wishing to express the ideas that the plaintiffs sought to communicate. Here, in this facial challenge, SFISD has not applied its policy to bar anyone or any expression. Instead, its policy invites expression, restricted only by time, place, and manner.

Here, we address a *facial challenge* to a policy under which the school district argues that it has indeed established a public forum. A facial challenge requires that we must not condemn the policy unless there is no way to implement it in a constitutional manner. *Clear Creek II*, 977 F.2d at 969; *cf. United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *see also Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 836 & n.6 (9th Cir. 1998) (refusing to view a school district's intentions skeptically when analyzing a facial challenge to a graduation policy). The difference between facial challenges and "as-applied" challenges is critically important, and yet the majority has erroneously decided to treat them identically. This error, in turn, causes the majority to stumble through the inappropriate process of applying forum tests and factors wholly inapplicable in the context of this appeal. *See, e.g.*, ante at 819-19 (attempting to apply the factor of "governmental intent," but then stating that (in this facial challenge) "the government's proffered intent does not govern this inquiry"); ante at 819-820 (analyzing the "extent of the use granted" factor when the policy has never been implemented).[13]

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[13] As these citations reveal, the majority applies factors designed for use in analyzing "as-applied" challenges to government restrictions on speech when the plaintiff has brought a facial challenge to a policy not yet implemented.

But the SFISD policy clearly survives a facial challenge. When a policy creating a forum places no barriers other than reasonable time, place, and manner restrictions on the speech, that policy creates a public forum.[14] As already stated, the SFISD policy only limits the class of potential speakers to graduating students; this lone restriction merely requires us to characterize the forum as a "limited" public forum.

2

Even if the SFISD policy did not create a limited public forum, the majority's decision to accept ecumenical prayers while barring other prayers contradicts established First Amendment law. Once the government creates a forum – whether a traditional public forum, a limited public forum, or even a nonpublic forum – and lets in some religious viewpoint, the government may not then exclude any other religious viewpoint. In other words, the government must *neutrally accommodate* all religious viewpoints once any one religious viewpoint (e.g., an ecumenical viewpoint) has entered the forum.

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[14] *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided [that] the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' ") (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)).

This result is dictated by the Supreme Court's consistent rule that even in nonpublic fora, the government may not engage in viewpoint discrimination. *See Perry*, 460 U.S. at 46, 103 S.Ct. 948 (government may not discriminate based on viewpoint in even a nonpublic forum); *Cornelius*, 473 U.S. at 806, 105 S.Ct. 3439 ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum *and are viewpoint neutral.*") (emphasis added and citation omitted); *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992) ("viewpoint discrimination violates the First Amendment regardless of the forum's classification"). Of utmost importance to the instant case, the Supreme Court has applied this hard and fast rule in the realm of religious speech. In the midst of chastising a school district's decision to exclude a religious group from using school premises solely because of the group's religious viewpoint, the Supreme Court stated that

> denial on that basis was plainly invalid under our holding in *Cornelius* that although a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Lamb's Chapel, 508 U.S. at 394, 113 S.Ct. 2141 (quotation marks and citations omitted; placement of ellipses in original). It is not surprising that the Supreme Court has

applied this prohibition against viewpoint restriction to religious speech. The Court has stated in graphic and certain terms that the First Amendment's Free Speech Clause fully applies to religious speech:

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private religion. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, or even acts of worship.

Pinette, 515 U.S. at 760, 115 S.Ct. 2440 (citations omitted).

In sum, even if we assume that the graduation policy creates only a nonpublic forum, the government may place some reasonable restrictions on the speech but it most assuredly cannot restrict speech because of its viewpoint. Thus, the majority creates a subset of constitutional violations when it allows the school district to create a forum where students can offer ecumenical prayers, but not the prayers of any other religion.[15] *See American Civil*

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[15] *Lamb's Chapel* and *Pinette* positively suggest that a "nonsectarian, nonproselytizing" content limitation is itself unconstitutional in this setting. *See Lamb's Chapel*, 508 U.S. at 394, 113 S.Ct. 2141 (noting that " 'government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses,' " and holding that a requirement of no religious content constitutes such an impermissible viewpoint restriction) (quoting *Cornelius*, 473

Liberties Union v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471, 1492 (3d Cir. 1996) (Mansmann, J., dissenting) (contrasting the *Clear Creek II* policy with another policy that "is more liberal in that it extends the scope of its toleration to include even sectarian prayer, if the graduates so choose," and concluding that the latter policy "comports with the First Amendment's prohibition against the inhibition of the practice of religion or of free expression"). Whatever criticisms one may make of the reasoning in *Clear Creek II*,[16] there can be no contention

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U.S. at 806, 105 S.Ct. 3439); *Pinette*, 515 U.S. at 766, 115 S.Ct. 2440 (stating that "giving sectarian religious speech preferential access to a forum . . . would violate the . . . Free Speech Clause, since it would involve a content limitation," and thereby implying that the reverse would also be true). Although *Clear Creek II* clearly held that a "nonsectarian, nonproselytizing" content limitation was constitutionally permissible in the context of a limited public forum, *see Clear Creek II*, 977 F.2d at 967 & 971, *Lamb's Chapel* and *Pinette* are subsequent decisions of the Supreme Court, so it would appear that this holding has been overruled.

[16] Although the question is not before us, courts and commentators have criticized the idea that an *elected* class could qualify either as "religion neutral" or even as a proper class for public forum and *Mergens* purposes. *See, e.g., Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 834 n.7 (9th Cir. 1998) (finding selection by grade point a superior method in this regard); *Black Horse*, 84 F.3d at 1477-78; *Recent Case*, 110 Harv. L. Rev. 781, 783-84 (1997); Rick A. Swanson, *Time for a Change: Analyzing Graduation Invocations and Benedictions under Religiously Neutral Principles of the Public Forum*, 26 U. Mem. L. Rev. 1405, 1422-25, 1432-33 & n.95 (1996); *cf. Widmar*, 454 U.S. at 275, 102 S.Ct. 269 (making explicit exception for the situation where "empirical evidence [shows] that religious groups will dominate the forum"); *Pinette*, 515 U.S. at 766, 115 S.Ct. 2440 (noting that "one can conceive of a[n unconstitutional] case in which the

that a content limitation would in any way improve the situation. It is therefore clear to me that the district court erred in requiring SFISD to incorporate these additional restrictions into their policy.

IV

Now we come to the remarkable holding of the majority that, for the most curious reasons, the First Amendment allows speech at graduation ceremonies but bars speech at sporting events. In short, there is a total absence of merit to the contention that the Football Policy might be constitutionally deficient when the graduation policy is not.[17] As I have tried to explain, the reason a

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governmental entity manipulates its administration of the public forum in such a manner that only certain religious groups take advantage of it"); *Clear Creek II*, 977 F.2d at 969 (stating that "[w]e can imagine discriminatory methods of implementing the [policy] that would make it a tool for governmental endorsement of religion").

[17] The Football Policy states:

> The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the

Clear Creek II policy works is that it neutrally accommodates both religious and nonreligious speech in a limited public forum. Constitutionally speaking, there are no location or other restrictions on where the state may elect to create its designated or limited public fora, *see Estiverne*, 863 F.2d at 376. It follows therefore that if the school policy at issue facially creates a limited public forum, that policy (here, the Football Policy) necessarily passes constitutional muster to allow the designated class of speakers to engage in both religious and non-religious speech. *But see Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989) (finding "equal access" policy for football game invocations unconstitutional, but without reference to public forum analysis and in the apparent assumption that the "invocations" at issue were certain to be religious in content).

On the other hand, the majority, which apparently feels measurable discomfort with our precedent, takes the Football Policy as an opportunity to break free from the constraints of *Clear Creek II*, and argues that, unlike graduation ceremonies, football games lack solemnity, which,

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> statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

Like the graduation policy, the Football Policy contains a fallback provision that goes into effect if a court enjoins the enforcement of the primary policy provisions. If this occurs, the policy goes into effect with the following sentence added to the last paragraph:

> Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing.

the majority concludes, undermines any legitimate reasons for the policy's application to such sporting events.[18] It may well be headline news to the majority, but a "solemn" ceremony is not the only occasion when many citizens feel the need for serious thoughts and words. Of course, football games do not possess the solemnity of a graduation ceremony. But that fact has all the relevance to our First Amendment discussion today as the fact that a hog was slaughtered to make SFISD's football. There are in fact several secular reasons for allowing a brief, serious message before football games – some of which SFISD has listed in its policy. At sporting events, messages and/or invocations can promote, among other things, honest and fair play, clean competition, individual challenge to be one's best, importance of team work, and many more goals that the majority could conceive would it only pause to do so.

Having again relinquished all editorial control, SFISD has created a limited public forum for the students to give brief statements or prayers concerning the value of those goals and the methods for achieving them. As with the graduation messages, there will be no "dueling debates." But make no mistake, whatever the subject – whether it be sportsmanship, the value of winning, the importance of safety, etc. – students will have different views on the subjects to be expressed. Because the SFISD

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[18] The majority also claims to find support in *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995), for striking the Football Policy. But *Duncanville* was an entirely different case, involving private prayers among team members – not "public" prayers or messages in any sense.

policy does nothing to discriminate based on viewpoint, and certainly does not direct any particular viewpoint (religious or secular), the primary SFISD Football Policy does not violate the First Amendment.

V

Our court's dalliance in prayer-writing will not, unfortunately, end with this case. Now that we have required prayers to be nonsectarian and nonproselytizing in content, we undoubtedly will have to give definition to those terms. This will prove no easy task. In *Lee*, the rabbi's benediction read in part:

> The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

As Justice Blackmun pointed out, the last sentence of this excerpt includes a direct quotation of Judeo-Christian scripture.[19] *Lee*, 505 U.S. at 604, n.5, 112 S.Ct. 2649 (Blackmun, J., concurring). Because the Court refused to find that the nonsectarian nature of a prayer could save it from Establishment Clause scrutiny, the Court did not need to decide whether this oration qualifies as nonsectarian or nonproselytizing. Our court will have to decide

[19] The quote is from the Book of the Prophet Micah, ch. 6, v. 8 ("He has showed you, O man, what is good. And what does the Lord require of you? To act justly and to love mercy and to walk humbly with your God.").

such issues.[20] If the prayer calls upon "Father" instead of "God," will we intervene? (Must the invocation be gender-neutral?) *See Chaudhuri v. Tennessee*, 130 F.3d 232, 241 n.2 (6th Cir. 1997) (Jones, J., concurring and dissenting) (noting that the supplication to " 'Heavenly Father' contains a package of religious bias"), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1308, 140 L.Ed.2d 473 (1998). If a student begins his benediction message by saying, "Blessed be He who decked the sky with constellations and set in it a lamp and a shining moon"[21] will we characterize this direct quotation of the Koran as sectarian and proselytizing? Our court's evolving prayer control will fashion the standard utterance at high school graduations throughout our Circuit: as students grope for a lawful way to express their most deeply held beliefs, on one of the most ceremonious days in their young lives, they will offer up the Fifth Circuit Court of Appeals's prayer.

The majority fails to realize that what is at issue in this *facial challenge* to this school policy is the neutral accommodation of non-coerced, private, religious speech, which allows students, selected by students, to express their personal viewpoints. The state is not involved. The school board has neither scripted, supervised, endorsed, suggested, nor edited these personal viewpoints. Yet the majority imposes a judicial curse upon sectarian religious

[20] *Cf. Rosenberger*, 515 U.S. at 835, 115 S.Ct. 2510 ("The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them.").

[21] The Koran, Al-Furqan 25:63, at 256 (N.J. Dawood trans., Penguin Books 1997).

speech. Because I believe that this result is at war with three clauses within the First Amendment, I respectfully dissent.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40150

JANE DOE, Individually and as next of friend for her minor children,
Jane and John Doe, Minor Children;
JANE DOE #2, Individually and as next of friend for her minor child,
John Doe, Minor Child, and John Doe, Individually,

Plaintiffs-Appellees-Cross Appellants,

versus

SANTA FE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants,

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant-Cross Appellee.

Appeals from the United States District Court for the Southern District of Texas

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Before JOLLY*, WIENER, and STEWART, Circuit Judges.

PER CURIAM:

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* Judge Jolly's opinion dissenting from the court's refusal to grant rehearing en banc is filed herewith.

The Petition for Rehearing is denied, and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

DISSENTING OPINION

E. GRADY JOLLY, Circuit Judge, with whom PATRICK E. HIGGINBOTHAM, EDITH H. JONES, JERRY E. SMITH, RHESA HAWKINS BARKSDALE, EMILIO M. GARZA, and HAROLD R. DeMOSS, Circuit Judges, join, dissenting:

I respectfully dissent from the court's denial of the petition for en banc hearing.

Every judge on this court must surely know that the policy announced by the majority of the panel – permitting students' ecumenical religious prayers or speech, but excluding all other religious prayers or speech by students – is unconstitutional. Yet a majority of this court has voted against an *en banc* proceeding to correct constitutional error. With great respect for each of these judges who is unwilling to step up to bat, I must say to them that we fail our constitutional and professional duty when we shy away from attempting to straighten out our muddled jurisprudence. The judges who voted against *en banc* are certainly not to be faulted for disagreeing with the viewpoint expressed in the dissent to the panel opinion – it may be a correct view of the case or it may not. But for the reasons that are pointed out in the panel dissent, the majority is surely, surely wrong in fundamental ways,

and yet the majority of the judges on our court wish to remain silent on an issue of great importance – and great confusion – in the circuit. With due respect, I regret their choice.

The majority opinion in *Santa Fe* appears to be a conscious decision, not merely to refuse to follow Supreme Court precedent, but to abdicate its duty to provide reasons for not following that precedent. The majority finds that the First Amendment allows ecumenical religious speech, but then somehow concludes – under the very same conditions – that the First Amendment prohibits religious speech expressing any other viewpoint. *See Doe v. Santa Fe Independent School Dist.*, 168 F.3d 806, 824 (5th Cir. 1999) ("the words 'nonsectarian, nonproselytizing' are constitutionally necessary components"). The majority acknowledges that this ruling endorses viewpoint discrimination.

Yet the fact that the Supreme Court has repeatedly stated that the government cannot engage in viewpoint discrimination when it creates any kind of a forum – even a nonpublic forum – does not give the majority pause. *See, e.g., Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn . . . are viewpoint neutral."); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The Supreme Court has specifically recognized – after our opinion in *Clear Creek II* – that this Free Speech Clause prohibition operates in the realm of religious speech. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394,

113 S.Ct. 2141, 124 L.Ed.2d 352 (1993). The panel majority's response to these admonitions? Silence. Now, because we decline to take this case en banc, our full court responds in silence as well. This silence is inexplicable in the light of the Supreme Court's recent statement that "[t]he first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 835, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (concluding that the state unconstitutionally excluded a religious viewpoint from general funding of student publications). The danger lurks just as ominously when the State exercises this power over students' speech, and this court greatly enhances the danger when it – an institution insulated from democratic restraints – refuses to explain why it allocates this power to the State in the face of contrary Supreme Court precedent.

The *Santa Fe* majority also casts our Circuit's Establishment Clause jurisprudence into throes of uncertainty. The majority opinions in *Santa Fe* and *Jones v. Clear Creek Independent Sch. Dist.*, 977 F.2d 963 (5th Cir.1992), are so clearly in conflict with each other that school districts within our jurisdiction will have no guidance on how to interpret our confused precedent.

The *Santa Fe* opinion conflicts with *Clear Creek II* in multiple ways – each important, and each without any explanation by the *Santa Fe* majority. First, and perhaps most puzzling, is the *Santa Fe* majority's holding that the Establishment Clause will not allow students to mention specific deities in their graduation messages, *Santa Fe*, 168

F.3d at 827, when in *Clear Creek II*, our court upheld a policy that allowed students to "employ the name of any deity." *Clear Creek II*, 977 F.2d at 967; *see also id.* at 969 ("invocations permitted by the Resolution 'may' include supplication to a deity"). The *Santa Fe* majority makes no effort to explain away its stark departure from our precedent. School districts are left to wonder whether they may allow students to state the name of Buddha, Jesus, Jehovah, or Mohammed in their graduation messages. Because *Clear Creek II* stands as prior precedent, school districts will be free to follow it, instead of the upstart rule announced in *Santa Fe*.

In yet another unexplained departure from *Clear Creek II*, the *Santa Fe* majority interpreted a policy allowing "invocations and/or benedictions" so as to allow only religious prayers. *Santa Fe*, 168 F.3d at 820 (students "will be chosen to deliver very circumscribed statements that under any definition are prayers"). The *Clear Creek II* panel also interpreted a policy allowing for "invocations and/or benedictions." That panel, however, held that the policy "permits invocations free of all religious content." *Clear Creek II*, 977 F.2d at 969. Yet again, there is no articulated authority to legitimize a holding that contradicts precedent.

Still another element of the jurisprudential quagmire following *Santa Fe* is the majority's decision to ignore the analytical approach that our precedent dictates when addressing a facial challenge to a school policy. In *Clear Creek II*, the panel recognized that because it was faced with a suit challenging the facial constitutionality of a school policy, the court must find that the policy "is constitutional unless there is no way to implement it on a

nondiscriminatory basis." *Clear Creek II*, 977 F.2d at 969. Without even so much as discussing the fact that the case presented a facial challenge to Santa Fe's policy, the *Santa Fe* majority assumed, for example, that the policy would restrict the number of student speakers to either one or two, and also assumed that the school would strictly limit the topics that the elected students could address. *Santa Fe*, 168 F.3d at 820. The majority assumed these "facts" even though the policy – and the record – is silent as to these hypothetical restrictions.

Santa Fe is not our Circuit's only case to hide from the analytical rule required by *Clear Creek II*. The panel in *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274, 279 n. 2 (5th Cir.1996), also ignored the rule without mentioning *Clear Creek II*. In its refusal to differentiate between a facial and an "as-applied" Establishment Clause challenge, the *Ingebretsen* panel cited two Supreme Court decisions, handed down in the late Eighties, in a footnote. *Id.*, 88 F.3d at 279 n. 2. Given our decision in *Clear Creek II*, however, the *Ingebretsen* panel's opinion on this issue was a day late and a Supreme Court citation short of relying on legitimate authority. *See Barber v. Johnson*, 145 F.3d 234, 237 (5th Cir.1998) (stating the rule that in this circuit one panel may not overrule another prior panel absent intervening legislation, a decision by our *en banc* court, or a decision of the Supreme Court).

Upon reading *Santa Fe*, *Ingebretsen*, and *Clear Creek II*, it seems, with regard to the Establishment Clause, that panels of our court pay little regard to previous jurisprudence. One might think that a specific holding of a prior opinion is no more than a puff of wind. *Santa Fe* disregards *Clear Creek II* today. The next panel can disregard

Santa Fe tomorrow. When judges can pick and choose without the constraints imposed by precedent, the public is left stranded, vulnerable to liability, helplessly dependent on the panel it draws. We could fulfill our constitutional and professional duty to the public, vote this case *en banc*, and be of a single voice. But when our court refuses to rehear *en banc* cases such as *Santa Fe*, this unrestrained decision-making goes uncorrected. This failure to act, in turn, allows individual members of our court to continue to engage in an activity that has all the appearance of simply advancing personal philosophy.

For these reasons, I respectfully DISSENT from the denial of rehearing *en banc*.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, ET AL.	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	G-95-176
SANTA FE	§	
INDEPENDENT	§	
SCHOOL DISTRICT	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was originally filed on April 4, 1995. Plaintiffs, both parents and children acting under pseudonyms, asserted claims against both the Santa Fe Independent School District and various individual members of the Board of Trustees of the District. Plaintiffs alleged a number of specific violations of their Constitutional rights to be free from a state-sponsored religion in their educational environment, and sought injunctive relief as well as damages, attorney's fees and costs.

Pursuant thereto, the Court conducted an emergency hearing in this matter, and issued an Interim Order (Instr. #4), on May 10, 1995. Essentially, the Order established specific guidelines regarding the conducting of then pending commencement and related activities, insofar as religious activity was involved. Certain parties thereafter attempted to intervene in this case, and after a number of procedural machinations, the matter was placed before the United States Court of Appeals for the Fifth Circuit, who issued an Order modifying certain aspects of the

Court's Interim Order. Thereafter, although the School District had already substantially modified past, allegedly religious practices, the Court held a supplemental status conference, and a calendar was established for purposes of establishment of a permanent, First Amendment policy on the part of Defendant School District. Secondary to the establishment of that timetable, various stipulations and related documents were filed among the papers of this cause, setting out with some clarity the history of past alleged religious activities in the Santa Fe School District.

The parties were then invited to submit Motions for Summary Judgment and Responses thereto. Defendants filed their Motion, but Plaintiffs failed to do so, despite the established record of numerous actual stipulations which would have allowed for clear, factual resolution of the case. Plaintiffs did file an extensive opposition to Defendant's Motion for Summary Judgment. After careful consideration of all of the pleadings on file herein, together with the substantial evidentiary materials submitted in conjunction therewith, the Court, on June 4, 1996, entered an Order of Summary Judgment on Liability Issues (Instr. #29). That Order is adopted herein, and made a part hereof as if such had been set out in detail. On the basis of that ruling, the individual Defendants were dismissed from the case, and the Court set the matter for trial on damages issues, only, during July, 1996. During the period of July 25-26, 1996, a non-jury trial on the damages phase of this case was completed. Thereafter, both parties submitted Proposed Findings of Fact and Conclusions of Law, Trial Briefs and Proposed Judgments, as well as Plaintiffs' Application for Attorney's Fees,

together with supports, and Response thereto. On the basis of careful consideration of each and all of such pleadings, and all applicable law, together with the testimony elicited during the damages trial and representations of counsel, the Court herewith enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiffs filed suit on April 4, 1995, alleging that the Santa Fe Independent School District (District) had committed acts in violation of the Establishment Clause of the First Amendment. Although most of these allegations involved past practices, they requested injunctive and declaratory relief and sought money damages pursuant to 42 U.S.C. § 1983. The Plaintiffs sued the District and several administrators and school board members. The individual Defendants were dismissed from this suit before trial.

2. The District is a political subdivision of the State of Texas and is governed by an elected, seven-person Board of Trustees.

3. On February 16, 1996, the District moved for summary judgment on all claims. On June 4, 1996, the Court granted the District's motion with respect to the Plaintiffs' request for injunctive relief. However, the Court denied the District's motion with respect to other claims asserted in the motion and *sua sponte* entered an Order finding the District liable with respect to several *past* incidents or practices. The Court then scheduled a trial on damages. The Court's Order of June 4, 1996, also stated that any party that disagreed with the Court's

findings on matters of liability could present evidence at the trial on damages to contest those findings. The trial on damages was held on July 25 and 26, 1996. As the anonymity of all Plaintiffs was preserved through trial, they are herein referred to by pseudonyms throughout.

4. Janie Doe testified that she is a junior at Santa Fe High School. She testified that, during the seventh grade in the Spring semester of 1993, her history teacher, David Wilson, distributed a flier that advertised a religious revival.

5. The District's Board of Trustees maintains a written policy, Policy EMI (Defendant's Exhibit 1), which prohibits teachers from distributing religious materials to students.

6. During the same class period, David Wilson made several disparaging comments about Janie Doe's religion, Mormonism, including the statement that Mormonism is a "cult." Janie Doe testified that several classmates made comments to her such as "I don't know whether I should hang out with you anymore." Janie Doe testified that Mr. Wilson's and the other student's comments lasted about 10 minutes. Janie Doe testified that she told her mother that the statements made in class were upsetting. Janie Doe testified that the students "never" bothered her again after this incident.

7. Janie Doe testified that Mr. Wilson's comments were out of character for him and that no teacher in Santa Fe ISD, before or since, had ever made such comments to her.

8. Janie Doe's mother, Mrs. Jane Doe, testified that she spoke with the principal, Bob Brundrette, who told her he would investigate. Mr. Brundrette testified that he interviewed Mr. Wilson, who admitted to distributing the religious flier and making disparaging comments about Mormonism. Mr. Brundrette testified that he was appalled by Mr. Wilson's conduct. Mr. Brundrette asked Mrs. Doe what remedy she desired. She requested an apology from Mr. Wilson. Mr. Brundrette set up a meeting with Mr. Wilson and Mrs. Doe. Mr. Wilson later apologized in front of Mrs. Doe and in front of the class.

9. On April 8, 1993, Mr. Brundrette reprimanded Mr. Wilson in writing (Defendant's Ex. 23) for distributing the flier and for making the disparaging comments. Mr. Wilson was informed that his conduct violated Board Policy EMI. He was given directives about the District's expectations concerning his future conduct. Mr. Brundrette threatened Mr. Wilson with "severe disciplinary action" should Mr. Wilson violate the written directives.

10. Janie Doe testified that she could not think of anything else the principal could have done.

11. The Court finds that Mr. Brundrette's response to Mr. Wilson's behavior was prompt, sincere, and reasonably calculated to prevent future violations. The Court finds that Mr. Brundrette's testimony was credible and sincere.

12. Janie Doe testified that she received "good grades" before and after this incident.

13. When asked about damages, Janie Doe testified that money is not a "big deal" to her and that she did not know her lawyers were requesting damages on her behalf until her deposition. Even during her moving trial testimony, she was unable to quantify any actual loss.

14. Richard Ownby, the District's superintendent, testified that David Wilson's conduct violated written Board Policy DH (Defendant's Ex. 28 p. 3.) The policy states that teachers shall not expose students to disparagement.

15. There is no evidence that the District maintained a policy or practice of tolerating conduct similar to David Wilson's.

16. Given Janie Doe's testimony that Mr. Wilson's conduct was out of character for him, that no teacher before or since treated Janie Doe in such a manner, and that the District maintains written policies against religious activities in the classroom and against disparagement of students, the Court finds that it was not reasonably foreseeable to the District that Mr. Wilson would engage in the conduct about which Janie Doe has complained. Given the District's prompt corrective action, the Court finds that the District was not deliberately indifferent to Mr. Wilson's conduct. Therefore, no District policy or practice proximately caused injury to Janie Doe.

17. Janie Doe appeared to be a strong, intelligent and emotionally stable young woman. While the incident plainly and quite justifiably upset her, she presented no medical or psychological evidence of damages caused by

this distress. She testified to no specific discernible injury to her emotional state.

18. Jane Doe testified that, in May 1994, John Doe Jr., who was in the third grade, brought home a permission slip from his teacher, Theresa Locke, to learn a song in sign language called "In this Very Room."

19. The words to this song are "In this very room there's quite enough love for one like me (all of us, for all the world) and in this very room there's quite enough joy for one like me (all of us, for all the world) and there's quite enough hope and quite enough power to chase away any gloom, for Jesus, Lord Jesus is in this very room." (Plaintiff's Ex. 19.)

20. Jane Doe testified that this was the first and only time her son was asked to participate in the singing (or signing) of a religious song at the District.

21. Jane Doe spoke to the principal, Earl Routh, about this incident. Mr. Routh instructed the teacher to discontinue use of the song or to drop the last line of the song. The teacher discontinued use of the song. Mr. Routh also gave the teacher a directive about not leaving young students unsupervised. That same month, Mr. Routh reminded his staff about the District's policies prohibiting religious teaching/practices in the schools. The Court finds that Mr. Routh's testimony was credible and sincere.

22. Roney McCrary testified that he has been a member of the school board since 1990. Fritz Barnett testified that he has been on the school board since 1991. Both testified that they were unaware of Mrs. Locke's use

of the religious sign language song. The Court finds that both Mr. Barnett and Mr. McCrary gave credible and sincere testimony. The superintendent, Richard Ownby, also testified that he unaware about the use of religious songs by elementary school teachers. The Court finds that Mr. Ownby's testimony likewise was credible and sincere and that, as a general matter, Mr. Ownby was both conscientious and professional in responding to parental concerns.

23. The Court finds that the District did not have a custom, policy, or practice of permitting elementary teachers to use songs such as this and was not deliberately indifferent to allegations of this nature. The Court finds that Mrs. Locke's conduct was not reasonably foreseeable to the District. Therefore, no District policy or practice proximately caused injury to John Doe, Jr.

24. John Doe, Jr., did not testify at trial. There is no evidence that this incident caused him emotional harm or other injury.

25. Susan Doe testified that, at the beginning of the 1994-1995 school year, her son, Butch Doe, brought home a permission slip to sing the "Johnny Appleseed" song before lunch in Mrs. Clayton's class.

26. The words to the "Johnny Appleseed" song are "Oh the Lord is good to me/And so I thank the Lord for giving me the things I need/the sun and the rain and the Appleseed/The Lord is good to me/Amen, Amen, Amen, Amen, Amen, Dig in!" Frankly, the song is one of the Court's childhood favorites and was included in a 1950's Walt Disney cartoon classic, celebrating the achievements

of "Johnny Appleseed." To suggest that this song establishes a religion is simply asinine.

27. Susan Doe did not contact the teacher or the District administration about this song. Neither did she contact any School Board member, although she has often done so in the past. Instead, she reported her complaint to Ms. Debbie Perkey of the ACLU, who called Superintendent Ownby. Mr. Ownby then called Mrs. Clayton's principal, Earl Routh, who instructed Mrs. Clayton not to lead her students in singing the song. Mr. Ownby testified that he was unaware of the use of the Johnny Appleseed song until this complaint was lodged.

28. Mrs. Clayton stopped using the Johnny Appleseed song. Ms. Debbie Perkey testified that she never made any further complaints about Mrs. Clayton's use of this or any similar song.

29. Board members Roney McCrary and Fritz Barnett testified that they were unaware of Mrs. Clayton's use of the Johnny Appleseed song.

30. The District maintains a written Board Policy, Policy EMI, that prohibits the teaching of religion or leading of prayers in the classroom. Mr. Routh testified that, during his seven years as the elementary school principal, he was aware of only two incidents of religious activity by teachers: the "In this Very Room" incident in May 1994 and the "Johnny Appleseed" incident in August, 1994. After the May 1994 incident, Mr. Routh reminded his staff about the Board's policies prohibiting religious practices in the schools. The Court finds that it was not reasonably foreseeable to the District that in August 1994 an elementary school teacher would ask her

students to sing a song with religious content. Nor was the District deliberately indifferent to this incident. No District policy or practice proximately caused injury to Butch Doe.

31. Butch Doe did not testify at trial. There is no evidence that use of the song caused him emotional harm or other injury.

32. Sam Doe did not testify. There is no evidence that his constitutional rights were violated or that he experienced actual injury as a result of any conduct of the District.

33. During the first week of the 1994-1995 school year, Susan Doe's son, Butch Doe, brought home a "Dear Parent" letter from Butch's third grade teacher, Mrs. Beverly Clayton (Plaintiff's Ex. 20). It was in a sealed envelope, addressed to the parent. There was no showing that Butch Doe ever saw, or was aware of the contents of the letter. In the handwritten note, the teacher introduces herself to her students' parents, describes her background, and gives six tips for raising happy and successful children, such as eating dinner together. The 21-sentence note contains one sentence that refers to a poll stating that students with a "strong religious background" are the most successful in school.

34. Susan Doe testified that she was "deeply insulted" by the note and again decided to contact the ACLU. Susan Doe did not call the teacher or the school district, or for that matter, simply throw the letter in the trash. She instead decided to literally make a "federal" case out of it.

35. Ms. Debbie Perkey, ACLU staff attorney, testified that she spoke to Superintendent Ownby after she learned about Mrs. Clayton's note. Ms. Perkey further testified that she never reported any further concerns about this teacher to the District after her call to Mr. Ownby.

36. The Court finds that Susan Doe's claimed reaction to Mrs. Clayton's letter was so unreasonable as to be simply bizarre, in light of the actual content of the letter. The Court finds that no reasonable person could have been insulted by the letter.

37. There is no evidence showing that the letter was authorized by the Board of Trustees or that it was written pursuant to a custom, practice, or policy of the Board.

38. The Court finds that Mrs. Clayton's letter, even if a little heavy handed and offensive to Susan Doe, did not cause Susan Doe actual, compensable harm.

39. Susan Doe also testified about her disapproval of the Johnny Appleseed song and the distribution of Bibles by the Gideons. There is no evidence that Susan Doe herself experienced actual injury as a result of any conduct of the District.

40. Jane Doe testified that, prior to filing this lawsuit, she ran for school board in Santa Fe ISD on two occasions. The Court finds that Jane Doe was active in public affairs in Santa Fe, Texas, and, in her community, is a public figure.

41. Jane Doe testified about the two incidents pertaining to her children Janie Doe and John Doe, Jr., and she testified about her disapproval of the distribution of

religious materials on school campuses, even if other groups have an equal right to distribute non-religious materials. There is no evidence that Jane Doe herself experienced actual injury as a result of any conduct of the District.

42. In 1993 and 1994, the Gideons requested permission to distribute Bibles at the intermediate school and the high school. During the school years in question, Board Policy GKA (Defendant's Ex. 9) permitted outside groups to distribute literature on a non-discriminatory basis.

43. The District historically has allowed a variety of groups to distribute literature, including the Gideons, DARE, the armed forces, and youth athletic groups.

44. Debbie Perkey testified that she was unaware of any outside group requesting and being denied permission to distribute literature to students. Notwithstanding, the Court finds that the Gideons were given preferential treatment over non-religious groups in the distribution of materials on campus, although the preference has now ceased.

45. In November 1993, the Ministerial Alliance presented a live-action, self-esteem-building program called "America, You're too Young to Die" to junior and senior high students who chose to attend. The program was presented during the school day. Mr. Ownby edited and deleted religious references from the script.

46. Ms. Debbie Perkey attended the program during the school day. She testified that the religious content was removed and that she reported no concerns about the

daytime program to the administration after viewing the edited program.

47. The Ministerial Alliance presented an unedited version of "America" at night in November 1993. The Ministerial Alliance paid a rental fee to the District. (Defendant's Ex. 32.) The evening version had religious content.

48. During the school years in question, the District routinely allowed a wide variety of groups to rent its facilities on a non-discriminatory basis. (Defendant's Exhibit 22.)

49. Board Policy GKD (Defendant's Ex. 6) permits community groups to rent District facilities.

50. None of the Plaintiffs testified that the daytime or nighttime presentations caused them emotional distress or any other actual harm.

51. None of the Plaintiffs testified that they experienced any emotional distress or other actual harm as a result of the holding of a baccalaureate at Santa Fe ISD either before or after commencement of this litigation.

52. The evidence at trial established that the District has historically waived rental fees for the use of school facilities for a variety of secular student-related events.

53. There is evidence that the District historically promoted or otherwise encouraged religious clubs, and the District gave preference to religious clubs in comparison to other student clubs. However, the practice has now ceased.

54. No Plaintiff testified that he or she had been harmed by the existence of any religious clubs.

55. Janie Doe testified that she is studying for the Advanced Placement English test and that four books of the Bible were recommended reading for test preparation. Janie Doe testified that alternative assignments are available for those who did not want to read the Bible.

56. Plaintiffs' pleadings do not encompass any complaint about reading assignments.

57. The Court takes judicial notice that the Bible is an extremely important work of history and literature, and indeed a cornerstone of Western philosophy, art and culture regardless of its religious content.

58. The Court finds that a high school senior of Miss Doe's age and intelligence can appreciate the importance of the Bible outside of its religious context.

59. Janie Doe did not contend in any way that the school's suggestion that she read four books of the Bible caused her actual harm, such as emotional distress or anguish.

60. The Court finds that no Plaintiff has suffered a compensable injury because of any actions of the District.

CONCLUSIONS OF LAW

1. Imputed liability is prohibited under 42 U.S.C. § 1983. *See Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 120-21, 112 S.Ct. 1061 (1992). To prevail in an action against a governmental entity, a Section 1983 plaintiff

must show an unconstitutional "policy" or "custom" executed by the governmental entity's final policy-making authority. *Id.* Isolated violations of law by the entity's employee do not constitute a custom or policy. *See Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016, 105 S.Ct. 3476, L.Ed 2d 612 (1985). In this case, the Plaintiffs' allegations of constitutional violations by school employees represent, at most, isolated occurrences and are insufficient as a matter of law to constitute a custom or policy under 42 U.S.C. § 1983.

2. Moreover, proof of an unlawful custom or policy is insufficient by itself to support a claim for damages. The Section 1983 plaintiff must establish that the custom or policy manifests "deliberate indifference" to whether students' constitutional rights are violated. *Gonzalez v. Ysleta Indep. School Dist.*, 996 F.2d 739, 759 (5th Cir. 1993); *Baker v. Putnal*, 75 F.3d 190 (5th Cir. 1996). The evidence in this case shows that the District responded appropriately – and was not deliberately indifferent – to allegations of religious activities by school employees.

3. However, even if the Plaintiffs could prove the above essential elements, the fatal flaw in their claim for damages is their failure to establish proximate cause. A plaintiff must show an "affirmative link" between the alleged "policy" and the claimed constitutional injury. *Oklahoma v. Tuttle*, 471 U.S. 808, 823 (1989). The causation standard in a Section 1983 action is proximate cause, which includes components of cause in fact and foreseeability. *Gonzalez*, 966 F.2d at 753 and 761 n. 13; *Reimer v. Smith*, 663 F.2d 1316, 1322 (5th Cir. 1981). The Plaintiffs failed to establish by a preponderance of the evidence that any specific custom or policy of the District was the

proximate cause of any injury they allegedly experienced. The incident that has troubled the Court the most – the disparagement of Janie Doe – was not caused by a custom or practice of the District. By no stretch of the imagination may one characterize the conduct of her teacher as reasonably foreseeable. Indeed, it was so vindictive, yet so out of character, that the Court has to wonder if it were the product of some transient mental aberration. The Plaintiffs were obligated to identify a particular type of violation and then to prove that an injury resulted from the particular violation. They failed to meet their burden of proof by a preponderance of the evidence.

4. The testimony of the adult Plaintiffs shows that the real purpose of their request for damages is to seek compensation based on the abstract value or importance of the infringed constitutional right. As a matter of law, damages may not be awarded for this purpose. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 310 (1986). In an action under 42 U.S.C. § 1983, to obtain damages, a plaintiff must show with specificity the actual harm caused by the constitutional violation. *Carey v. Piphus*, 435 U.S. 247, 255-56, 264 (1978). Nominal damages of one dollar are awarded when the plaintiff proves a violation but is unable to show actual damages. *Id.* at 266-67.

5. Even if the Plaintiffs could establish the required elements of a Section 1983 damages claim, a claimant's testimony, by itself, is insufficient to establish emotional distress in a civil rights case. *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (1996). The testimony of the Plaintiffs was conclusory, uncorroborated, and described no specific discernible injuries. Therefore, it was insufficient

as a matter of law to establish emotional distress or other compensable injury. Under the governing law, none of the Plaintiffs are entitled to damages.

6. Moreover, an essential element of a Section 1983 claim for damages is that the injuries were caused by a person "acting under color of state law." *Robertson v. City of Plano*, 70 F.3d 21, 23 (5th Cir. 1995). Accordingly, Plaintiffs may not recover any damages for having endured rude remarks or offensive comments from members of the community or classmates.

7. Likewise, the law does not afford a remedy of money damages for exposure to ideas, songs, prayers, or critical viewpoints such as those at issue in this lawsuit. *See, e.g., Warner v. Orange County Dept. of Probation*, 95 F. 3d 202 (2d Cir. 1996). Even if such activities were done by the District in violation of the Establishment Clause, they are not the type of activities that cause compensable injuries.

8. Accordingly, the Court concludes that the Plaintiffs have failed to establish their claims against the District under Section 1983. Moreover, even if Plaintiffs had established such claims, they failed to come forward with evidence of any compensable injuries. Therefore, the Court finds that the Plaintiffs should take nothing of and from the Defendant School District by way of their action, and that the District is entitled to judgment in its favor on all claims.

9. To the extent that any of the foregoing Findings of Fact constitute Conclusions of Law, they are adopted as such. To the extent that any Conclusions of Law constitute Findings of Fact, they are adopted as such.

IT IS SO ORDERED.

DONE at Galveston, Texas, this the 13th day of December, 1996.

SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, ET AL	§	CIVIL ACTION NO. G-95-176
VS.	§	
SANTA FE INDEPENDENT SCHOOL DISTRICT	§	

FINAL JUDGMENT

(Entered Dec. 13, 1996)

For the reasons set out in the Court's Findings of Fact, Conclusions of Law and Order Denying Attorneys' Fees, filed this date, herein, it is

ORDERED, ADJUDGED and **DECREED** that Plaintiffs take nothing of and from Defendant, by virtue of any claims asserted whatsoever herein. Likewise, Plaintiffs are awarded no attorney's fees, as regards the prosecution of any claims asserted herein. Each party shall bear his, her or its own taxable costs and expenses incurred to date.

ANY RELIEF NOT EXPRESSLY GRANTED HEREIN IS DENIED. THIS IS A FINAL JUDGMENT.

DONE at Galveston, Texas, this the 13th day of December, 1996.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, ET AL.	§	
VS.	§	CIVIL ACTION NO. G-95-176
SANTA FE INDEPENDENT SCHOOL DISTRICT, ET AL.	§	

ORDER OF SUMMARY JUDGMENT ON LIABILITY ISSUES

Plaintiffs commenced this action pursuant to section 1983 of title 42 of the United States Code, alleging various violations of the First Amendment prohibition against governmental establishment of religion by the Santa Fe Independent School District ("School District"). The underlying facts of this action are not in dispute; indeed, throughout the numerous procedural nuances encountered thus far in the litigation, Defendants have not contested – and, by changing their policies in response to the filing of this action, have manifested their acquiescence in – the relevant factual averments of Plaintiffs.[1] Summary

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[1] The Court now accepts the relevant factual averments of Plaintiffs for summary judgment purposes. Should any of the parties wish to dispute one or more of the facts upon which this Order relies, evidence suggesting the contrary may be presented at trial with the express understanding that the Court will not, for any reason, permit either side additional time in the presentation of its case at trial. *See infra* part VI. Failure to

judgment is therefore appropriate on all liability issues and on Plaintiffs' request for injunctive relief. *See* Fed. R. Civ. P. 56(c) (stating that summary judgment is appropriate if no genuine issues of material fact exist and only issues of law are present); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (noting that summary judgment may be entered on the Court's own motion if the record has been adequately developed). Upon careful consideration of the relevant facts and applicable law, the Court now **GRANTS** summary judgment in favor of Plaintiffs as to liability for the incidents occurring pursuant to the past policies of the School District and **GRANTS** summary judgment against Plaintiffs on their request for injunctive relief curbing the current policies of the School District.

I. Background

Two sets of School District policies are at issue. One set of policies, which was in place at the moment Plaintiffs commenced this action, are those policies pursuant to which the specific incidents forming the basis of Plaintiffs' claims occurred.[2] The other set of policies, which

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contest the facts pertaining to liability at trial shall be construed by the Court as a knowing and binding waiver of any right to challenge such facts.

[2] These incidents occurred amidst the School District's repeated tolerance of similar activities and oftentimes with the awareness and explicit approval of the School District. These incidents therefore reflect the actual policies of the School District at that time, irrespective of any applicable written policies which may have been in place. *See Monell v. Department of Social Servs. of New York*, 436 U.S. 658, 690-91 (1978)

was adopted through abandonment or amendment of the prior policies, consists of the current policies of the School District pertaining to the kinds of activity challenged by Plaintiffs.

As stated in the Complaint, Plaintiffs' claims are based specifically upon the following incidents occurring under the former policies of the School District: (1) distinctively Christian prayer, containing specific and repeated references to Jesus Christ, has continually been infused into graduation ceremonies; (2) the public address system of at least one school has regularly been used for delivering prayers prior to each football game and baseball game, for which the attendance of cheerleaders and band members is required; (3) a clergy member, who has been chosen exclusively by the School District, has conducted a religious baccalaureate on school property, resulting in utility and maintenance expenses to the school; (4) the Gideons, at the invitation and with the authorization of the School Board, periodically distributed Bibles to students as they exited school[3]; (5) a teacher demeaned a student's religion in the presence of other students, who were thereby inspired to

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(recognizing that a "custom" of an entity need not be expressed as a formal or written policy to give rise to liability under section 1983); *see also Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (holding that the actions of school employees are representative of school district policies).

[3] Such a practice appears to violate the School District's own written policy prohibiting the distribution of Bibles, but, nonetheless, the School District in fact adhered to a contrary policy of permitting the Gideons to engage in the proscribed conduct.

make similarly disparaging remarks of their own; (6) another teacher taught students sign language through use of a religious song while forcing an objecting student to remain unattended outside the classroom, and, upon discontinuation of this practice, the teacher made the announcement to the class while staring directly at the student who objected; (7) yet another teacher circulated a flier to parents/guardians of students which advised that "[s]tudents with strong religious background [sic] are the most likely to succeed in school" and also circulated a song which praises "the Lord"; (8) a flier soliciting membership in a religious group, which meets during school hours, was distributed generally to the student body; and (9) an edited version of a production containing some religious content was performed during normal school hours on school grounds, and an unedited version of the same production containing even more substantial and extensive religious content was performed after school hours on property rented from the school by a private religious organization.[4] At least one Plaintiff was personally involved in, or directly affected by, each of these incidents. Plaintiffs do not base any claims on any other activities attributable to the School Board.

Most of the policies leading to the incidents referenced in the Complaint have been abandoned since commencement of this action. In particular, no Bibles have

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[4] The current record does not clearly indicate which portions of the production were omitted from the edited version. Significant religious portions, however, certainly constituted part of the edited version as well as the unedited version.

been distributed to students, no teacher has made disparaging remarks concerning the religious beliefs of any student, no religious songs have been taught to students, religious promotions or fliers advocating participation in specified religious events or organizations have not been circulated by teachers,[5] and no religious presentations have been performed on school grounds. In addition, the policies pertaining to those incidents which have continued to occur in some fashion have been amended significantly: students now choose, by secret ballot held outside of normal school hours, whether an invocation and benediction is performed at graduation by a student volunteer, who is also selected by secret ballot[6]; students now choose, in the same manner, whether a student delivers a "message" before interscholastic sporting events[7]; and now local clergy may rent property from the school to conduct a privately sponsored baccalaureate outside normal school hours. No other current policies of the School District are at issue.

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[5] The religious organization previously promoted by a teacher is not even included in the most recent "Santa Fe High School Organization Handbook."

[6] The current policy on invocations and benedictions at graduation ceremonies also contains a provision for a new policy to become effective automatically if a court order prevents continued implementation of the current policy. The new policy would be substantively identical to the current policy, except for a requirement that the invocation and benediction must be nonsectarian and nonproselytizing.

[7] The current policy on pre-game messages also contains a provision substantively identical to the one described in the preceding footnote. *See supra* note 6.

II. Meaning of the Establishment Clause

The Establishment Clause of the First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I, cl. 1. At its heart, the Establishment Clause prohibits federal or state governmental entities from manifesting a preference for particular religious sects or for religion in general. *See, e.g., McCollum v. Board of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 211 (1948); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The exact contours of the Establishment Clause, however, have escaped precise definition by the federal judiciary. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 405 (5th Cir. 1995) (describing "modern Establishment Clause jurisprudence" as being "rife with confusion").

The United States Court of Appeals for the Fifth Circuit presently directs that analyses of whether governmental action violates the Establishment Clause must proceed under each of the five tests the United States Supreme Court continues to endorse. *Jones v. Clear Creek Indep. Sch. Dist.* (*Jones II*), 977 F.2d 963 (5th Cir. 1992) (identifying the tests devised in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which establishes the first three tests, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), which establishes the fourth test, and, *Lee v. Weisman*, 505 U.S. 577 (1992), which establishes the fifth and final test), *cert. denied*, 508 U.S. 967 (1993); *see also Ingebretsen v. Jackson Public Sch. Dist.*, ___ F.3d ___, 1996 WL 205, at *7 (5th Cir. 1996) (strictly adhering to the approach utilized in *Jones*,

though regrouping and compressing the tests); *Duncanville*, 70 F.3d at 405 (same). First, the action must preeminently "reflect a clearly secular purpose." *E.g., Lee*, 505 U.S. at 585; *Duncanville*, 70 F.3d at 405. Second, the "primary effect" of the action must "neither advance[ ] nor inhibit [ ] religion." *E.g., Lee*, 505 U.S. at 585; *Duncanville*, 70 F.3d at 405. Third, the action must not involve "excessive entanglement with religion." *E.g., Lee*, 505 U.S. at 585; *Duncanville*, 70 F.3d at 405. Fourth, the action must not have "the purpose or effect of endorsing religion." *E.g., Allegheny*, 492 U.S. at 592 (quotation marks omitted); *accord Duncanville*, 70 F.3d at 405. Fifth, and finally, the action must not "coerce anyone to support or participate in" a religious exercise. *E.g., Lee*, 505 U.S. at 587; *accord Duncanville*, 70 F.3d at 405.

III. Liability: Analysis of Former Policies

The Court must analyze the School District's former policies through consideration of the incidents which occurred pursuant to them. *See supra* note 2 & accompanying text (concluding that the actual policies of the School District were defined by the incidents occurring under them). Each of those incidents constituted a violation of the Establishment Clause, as explained below.

The Fifth Circuit comprehensively examined the usage of prayer at graduation ceremonies in *Jones II*. In that case, the Court upheld the school district's graduation policy by heavily relying upon its requirement that any prayer delivered must be nonsectarian and non-proselytizing, especially in connection with the Court's analysis under the second test, which prohibits government

activities having the primary effect of advancing religion, and also in connection with the Court's analysis under the third test, which prohibits excessive governmental entanglement with religion. *Id.* at 967-68 (referentially adopting relevant portions of *Jones v. Clear Creek Indep. Sch. Dist.* (*Jones I*), 930 F.2d 416 (5th Cir. 1991), *vacated*, 505 U.S. 1215 (1992)). The graduation prayers at issue in the instant case, in contrast, are infused with explicit references to Jesus Christ and otherwise appeal to distinctively Christian beliefs. The Court accordingly finds that use of these prayers during graduation ceremonies, considered in light of the overall manner in which they were delivered, violated the Establishment Clause. *See* Order of May 10, 1996, at 4 ("Thus, under explicit Fifth Circuit mandate, which absolutely binds this Court, any invocation or benediction permitted [by the School District] must be nonsectarian and non-proselytizing."); *Jones II*, 977 F.2d at 967-68; *see also Ingebretsen*, 1996 WL 205, at *4 (noting that the holding in *Jones II* depended upon the school district's requirement that prayers be nonsectarian and non-proselytizing); *supra* part II.

The deliverance of a prayer over the school's public address system prior to each football and baseball game coerces student participation in religious events, because student attendance at school is mandatory. Such activity, therefore, fails the fifth test as stated in *Lee*. *See supra* part II. Indeed, the setting in which the test was originally developed was less coercive than the situation at bar, because attendance at the graduation ceremony in *Lee* was strictly optional. *See Lee*, 505 U.S. at 594; *see also Ingebretsen*, 1996 WL 205, at *3. Although students may opt not to become cheerleaders or band members, this is

largely irrelevant to the analysis. *Cf. Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (upholding an injunction prohibiting school officials from prayer participation during basketball games after noting, among other things, that "members of the basketball team are required to attend" practices and games). The Court accordingly finds that the use of prayers prior to interscholastic sporting events, in the manner conducted, violated the Establishment Clause.

The School District's policy allowing a religious baccalaureate to be held on school property, which resulted in some expense to the school, had the purpose and primary effect of promoting religion. This policy, therefore, failed the first two tests for compliance with the Establishment Clause. *See supra* part II. The School District's selection of a clergy member to conduct the baccalaureate also runs afoul of the third test, which prohibits excessive governmental entanglement with religion. *See id.* The Court accordingly finds that School District's allowance for the baccalaureate in this manner violated the Establishment Clause.

The School District's invitation for the Gideons to distribute Bibles on school grounds,[8] the circulation of

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[8] The record contains no indication that the School District permitted any other group similar access to the students, thereby completely undermining any arguments dependent upon the guarantee of free speech under the First Amendment to the United States Constitution. To the extent that written policies – which Defendants admit were often not followed – purport to establish the contrary, the Court categorically rejects them as not indicative of the School District's actual policies. *Cf. supra* note 3.

fliers to parents/guardians of students advising that "Students with strong religious background [sic] are the most likely to succeed in school," and the circulation of fliers soliciting membership in a religious group meeting during school hours, each had the primary effect and apparent purpose of advancing religion. As such, all fail, at a minimum, the first and second tests.[9] *See supra* part II. The Court, therefore, finds that each of these activities violated of the Establishment Clause.

The criticism of a student's religion in front of her classmates, and the public embarrassment of a student who objected to the teaching of a religious song, constituted governmental endorsements of religion. Each of these endorsements failed the fourth test, because for each "a reasonable person would view the challenged action as a disapproval of her contrary religious choices." *Jones II*, 977 F.2d at 968; *see also supra* part II. The same is true concerning the performance of the edited version of a religious production during normal school hours on school grounds and the performance of the unedited version held after school on rented property,[10] which

[9] The distribution of Bibles may also have amounted to coercion prohibited under the Establishment Clause, though the Court finds no present need to make this determination. *See, e.g.*, Doe Affidavit (stating that the Gideons routinely forced Bibles upon even unwanting students).

[10] The record contains no evidence that other or nonreligious productions were given similar treatment by the School District, and therefore the First Amendment guarantee of free speech does not come into play in the analysis. The Court expresses no opinion on whether the performance of a religious production held after school hours would have violated the Establishment Clause absent the prior endorsement of the edited version of the production.

carried with it the prior endorsement of the edited version.[11] *See id.* The Court accordingly finds that each and all of these occurrences constituted violations of the Establishment Clause.

In sum, each of the incidents forming the basis of Plaintiffs' claims constituted a violation of the Establishment Clause. Accordingly, the Court, under the parameters described above, *see supra* note 1, **GRANTS** summary judgment in favor of Plaintiffs on all liability issues.

IV. Injunctive Relief: Analysis of Current Policies

The Court must determine whether the School District's current policies comport with the Establishment Clause to assess whether injunctive relief is appropriate. As noted earlier, most of the policies at issue have been wholly abandoned by the School District since commencement of this action. *See supra* part I. The Court, therefore, only needs to consider the current policies on invocations and benedictions at graduation ceremonies, baccalaureate services, and pre-game "messages" before football and baseball games. *See supra* part I.

The School District's current policies on invocations and benedictions at graduation and on pre-game prayer for football and baseball games are closely modelled after the policies upheld in *Jones II*, except for the crucial distinction that the School District's current policies do

[11] Those attending the performance of the unedited version likely knew of the performance of the edited version during school hours.

not require that any prayers delivered must be nonsectarian and non-proselytizing. *See Jones II*, 977 F.2d at 964 (analyzing a policy permitting "student volunteers to deliver nonsectarian, non-proselytizing invocations at the graduation ceremonies"); *id.* at 966-972 (emphasizing the importance of a requirement that prayers be nonsectarian and non-proselytizing). As they currently stand, therefore, these current policies of the School District cannot survive scrutiny under *Jones II*. *See* Order of August 17, 1995, at 2 (holding that pre-game prayers must be nonsectarian and non-proselytizing under the mandates of *Jones II*); *Ingebretsen*, 1996 WL 205, at *4 ("We decline . . . to reconsider our holding in *Jones II* which allows students to solemnize their graduation ceremonies with a student-initiated, non-proselytizing, and nonsectarian prayer given by a student."); *see also Duncanville*, 70 F.3d at 406 (discussing the holding of *Jones II*). Nonetheless, injunctive relief cannot appropriately be awarded in the instant case on this ground, because the School District's current policies unambiguously provide that new policies, which correct for the fatal deficiencies by including nonsectarian and non-proselytizing requirements, automatically become effective upon the issuance of an order declaring the current policies invalid. Accordingly, as the School District is herein Ordered to effectuate those new policies, injunctive relief is not needed to ensure the School District's compliance with the Establishment Clause.[12]

[12] The Court reaches this conclusion against the backdrop of the School District's recent efforts to bring their policies into conformity with the mandates of the Establishment Clause and the lack of any indication that sectarian or proselytizing prayers have actually been delivered under the current policies on graduation ceremonies and pre-game messages.

The current policy on baccalaureate services similarly does not warrant the issuance of injunctive relief. In *Jones II*, the Court explicitly condoned "privately-sponsored baccalaureate" services as a legitimate method of "seek[ing] God's recognition" of student achievement. *Jones II*, 97 F.2d at 972; *see also Lee*, 505 U.S. at 629 (Souter, J., concurring) (stating that graduating students may conduct a privately sponsored baccalaureate). Indeed, under the School District's current policy on baccalaureates, each of the five tests is satisfied: the School District's rental of property to those performing the baccalaureate services has the secular purpose and primary effect of attaining a financial profit; the School District's lack of involvement in the organization or conduction of the services insulates it from excessive entanglement with religion; and reasonable people, of any religion, would not perceive the School District as disapproving of their religious choices nor feel coerced into participating in religious activities. Injunctive relief, therefore, would not be appropriate in relation to current policies on baccalaureates held on school property.

In sum, injunctive relief may not appropriately be awarded to curb any of the current policies of the School District at issue. Consequently, the Court **GRANTS** summary judgment against Plaintiffs on any and all of their requests for injunctive relief.[13]

[13] Should Plaintiffs or other interested parties feel that the actual policies of the School District differ from the newly stated policies in such a manner as to be violative of the Establishment Clause, a new cause of action may be commenced in a Court of competent jurisdiction. This Court, however, will not hereinafter reconsider granting injunctive relief in connection with this action.

V. Claims Against the Individual Defendants

Defendants and Plaintiffs both argue at some length in their respective Briefs as to whether the claims asserted against the individual Defendants should be dismissed on the basis that these Defendants have been named strictly in their official capacities. Interestingly enough, the parties appear to agree, as the Court now finds, that no claims have actually been asserted against any individual Defendants. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (explaining that actions brought against individuals in their official capacities are, in fact, actions against the entity employing those individuals "in all respects other than name"). The Court accordingly finds the parties' arguments on this issue merely academic and altogether **MOOT**, and the Court hereby directs the parties to focus their attention and energies on the numerous other issues bearing true import to the substantive points in controversy in this case. To be sure, the Court declines to rule on whether the individual Defendant must be dismissed as parties to this action unless and until the parties fairly demonstrate the practical or legal importance of making such a determination.

VI. Conclusion

For the reasons stated above, Summary Judgment is **GRANTED** in favor of Plaintiffs on all issues of liability for incidents occurring pursuant to former policies of the School Board. Summary Judgment is **GRANTED** against Plaintiffs on each and all of their requests for injunctive

relief designed to curb current policies of the School Board.

Limited discovery will be permitted through June 28, 1996, strictly on remaining issues of liability and damages. *See supra* note 1. Each side may take a maximum of seven fact depositions, each of which is limited to two hours, and two expert depositions, each of which is limited to four hours. Medical experts may **NOT** be deposed, though depositions by written questions are permitted. All witness lists and exhibit lists must be submitted no later than July 15, 1996. ***NO EXTENSIONS WILL BE GRANTED.***

A trial on all remaining issues of liability and damages is hereby set for a two-day period on either July 18-19, 1996, or July 25-26, 1996, subject only to the Court's criminal docket. This trial setting is absolutely firm, save for the exception already noted. ***NO CONTINUANCES WILL BE GRANTED.*** Each side will be permitted a maximum of one day to present its case. ***FAILURE OF ANY PARTY TO APPEAR AT THAT TIME THROUGH AN ATTORNEY FULLY KNOWLEDGEABLE OF THE CASE WILL RESULT IN THE STRIKING OF THAT PARTY'S PLEADINGS.*** Shortly after conclusion of this trial, the Court will issue findings of fact and conclusions of law and then set an accelerated schedule for disposing of all remaining issues, most notably the availability and award of attorneys' fees.

The parties are **ORDERED** to bear their own taxable costs and expenses incurred herein to date. The parties are also **ORDERED** to file nothing further on the issues addressed in this Order, in this Court, including motions

to reconsider and the like. Instead, the parties are instructed to seek any further relief to which they feel themselves entitled in the United States Court of Appeals for the Fifth Circuit, as may be appropriate in due course. The parties will, of course, be given an opportunity to brief relevant issues once the above trial has been completed.

IT IS SO ORDERED.

DONE this 3rd day of June 1996, at Galveston, Texas.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

APPENDIX F

STUDENT ACTIVITIES: FN (LOCAL)
PRE-GAME CEREMONIES AT FOOTBALL GAMES

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing.

APPENDIX G

SANTA FE ISD GRADUATION POLICY

Dated: July 1995

The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect by secret ballot, from a list of student volunteers, students to deliver invocations and benedictions for the purpose of solemnizing their graduation ceremonies.

If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies.

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No. 99-62

In The

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, Individually and as next friend for her minor Children, Jane and John Doe, Minor Children; Jane Doe #2, Individually and as next friend for her minor child, John Doe, Minor Child, and John Doe, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ANTHONY P. GRIFFIN*
Counsel of Record
ANTHONY P. GRIFFIN, INC.
Lawyers
1115 Moody
Galveston, Texas 77550
409/763-0386
1/800/750-5034

DEBORA PERKEY
Attorney at Law
4012 Avenue O 1/2
Galveston, Texas 77550
409/750-9221

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

This Statement of Case is somewhat restricted in that it essentially addresses misstatements found in the Petitioner's Statement of the Case. The Respondents, Jane Does, each mothers of school age children, brought suit in the district court below complaining with respect to certain practices of the Petitioner school district. These practices included the Petitioner, Santa Fe Independent School District ("SFISD"), allowing students to read overtly Christian prayers from the stage at graduation ceremonies and over the public address system at home football games. *Jane Doe, et al. v. Santa Fe Indep. School Dist.*, 168 F.3d 806, 810 (5th Cir. 1999). The prayers were delivered as "invocations" or "benedictions" for these events, and typically were given by officers of the student council. *Id.* SFISD maintained complete control over the programs and facilities during the reading of the prayers, including the ability to mute the microphone or remove the speaker. *Id.* Furthermore, the text of the graduation invocations and benedictions was screened by SFISD for content prior to the ceremony. *Id.*

The first misstatement found in Petitioner's Statement of the Case is seen in the following statement to this Court, "[t]he questions presented here arise from the Respondents' complaints that two of Santa Fe ISD's policies permitted religious content in speech by students at certain school events." Petition for Certiorari at p. 2. The statement is incorrect in that Respondents filed suit in the district court below with respect to the actual practices of the district. The school district developed the policies at issue only after the district court ordered the Petitioner to "finalize a unified First Amendment religion/expression

policy addressing all issues." *Jane Doe, et al. v. Santa Fe Indep. School Dist., supra* at 812.

In response to the court's order, SFISD presented graduation and football prayer policies that were two-tier: the first-tier was to allow prayer with no requirement that the prayer be "nonsectarian and nonproselytizing." The second-tier, or the fall back position, was one that was to take effect if the district court was to reject their desire to have prayer that was nonsectarian and nonproselytizing. If the district court would reject the first-tier, then and only then, the district would insert the words "nonsectarian" and "nonproselytizing" in their graduation and football policies. It is clear that the district policies were directed at the Fifth Circuit's previous ruling in *Jones v. Clear Creek Indep. School Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) ("*Clear Creek II*").

Curiously, the Petitioner omits from its Statement of Facts all of the Fifth Circuit's findings as to the historical context in which the district adopted their policies and the district's intent in developing those policies, when in fact many of the Fifth Circuit's holdings were based on these findings. For example, in analyzing the secular purpose prong of the *Lemon* test, the Fifth Circuit found the school district's true intent was to encourage sectarian and proselytizing prayers. The court correctly concluded that the district's two-tier policies could only be found to be an "attempt to encourage sectarian and proselytizing prayers – a purpose which is the antithesis of secular." *Jane Doe, et al. v. Santa Fe Indep. School Dist., supra* at 816. The court also stated, "Our cynicism about

the school board's proffered secular purpose is galvanized by SFISD's inclusion of the fall-back alternative that would re-insert the twin restrictions ipso facto should the district court invalidate the basic provision of the July policy." *Id.* at 817.

The Fifth Circuit also looked to the intent of the school district as it related to whether it had created a public forum at graduation or football games:

> SFISD attempts to evade the requirements of the Establishment Clause by running for the protective cover of a designated public forum. We must, therefore, view skeptically SFISD's own self-serving assertion of its intent and examine closely the relationship between the objective nature of the venue and its compatibility with expressive activity.

Id. at 820.

Similarly, in reviewing the practices of the district and the context in which their policies were developed, the court found that, "[t]he context of the evolutionary history in which SFISD developed its series of prayer policies further confirms the school district's penumbral religious purpose." *Id.* at 816. Furthermore, the Fifth Circuit characterized the Respondents' proof in the district court as: "evidence that the Does were able to accumulate covered a wide variety of disturbing incidents and practices." *Id.* at 809-810. The Fifth Circuit also took note of the attempts by SFISD administrators, teachers, and other employees "overtly or covertly to ferret out the identities of the Plaintiffs . . . by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping.' " *Id.* at 809, n.1.

The Petitioner also misstates what and why the Fifth Circuit rejected its attempt at structuring a football prayer policy. On page 5 of the Petitioner's Petition for Certiorari the following is found:

> The Fifth Circuit held that this policy violates the Establishment Clause because it permits prayer at a school-sponsored athletic event before a "government-organized audience."

In fact, the Fifth Circuit was far more restrictive and quite clear in its rejection of the school district's policies:

> Thus, as we indicated in *Duncanville* [70 F.3d 402 (5th Cir. 1995)], our decision in *Clear Creek II* hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek Prayer Policy cannot survive. We, therefore reverse the district court's holding that SFISD's alternative Clear Creek Prayer Policy can be extended to football games.

Id. at 823.

And finally the Respondent overstates the Fifth Circuit's ruling when it submits, "[t]he court further held, however, that no student prayers are permitted at other school-sponsored functions and that Santa Fe ISD's football game student speech policy violated the Establishment Clause because it theoretically allowed prayer as one of the types of speech a student might deliver." Petition for Certiorari at p. 3. The statement is incorrect in that this issue was never broached in the trial court below. The only policy that was presented by the Petitioner to the district court was that of football and graduation ceremonies. The application of this distinction is

seen when the Petitioner seeks to have this Court review "other school functions" in the Questions Presented (Question 1), when the record is silent as to any other policy being subjected to review.

ARGUMENT

REASONS FOR DENYING THE WRIT

The school district's petition for certiorari in this case rests on two flawed premises. First, the school district argues that the decision below demonstrates a conflict among the circuits on the constitutional rules governing student-led and student-initiated prayer at public school graduation ceremonies and football games. Second, the school district argues that the Fifth Circuit's reference to overtly sectarian and proselytizing prayer at either graduation or football games is inconsistent with this Court's Establishment Clause jurisprudence. Neither claim has merit; neither warrants plenary review.

I. PETITIONER MISCHARACTERIZES THE RELEVANT LOWER COURT DECISIONS.

The school district's assertion of a circuit conflict rests principally on the Eleventh Circuit's recent decision in *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999). While hardly a model of clarity, *Chandler* does not go nearly as far as Petitioner suggests in allowing school prayer so long as it is student run and student initiated.

At the outset, it is important to note that the district court in *Chandler* struck down an Alabama statute permitting nonsectarian, nonproselytizing student-initiated prayer, invocations and benedictions during compulsory or non-compulsory school-related assemblies, sporting events, graduation ceremonies and other school-sponsored events. *Chandler, supra* at 1256. The Eleventh Circuit's ruling on the constitutionality of the statute was not appealed and is entirely consistent with the Fifth Circuit's approach in football games and hardly supports the school district's contention in the case that students should be allowed to engage even in sectarian and proselytizing prayer at graduation.

The issue that was appealed to the Eleventh Circuit in *Chandler* was whether the district court's injunction represented an appropriate remedy for the uncontested (on appeal) constitutional violations. The Eleventh Circuit's decision vacating the injunction was based on its highly debatable conclusion that the injunction prohibited all student prayer in school (including, for example, a student's whispered prayer prior to a math exam). Even so, the Eleventh Circuit agreed with the Fifth Circuit that "[p]roselytizing speech is inherently coercive and, the Constitution prohibits it from the government's pulpit." *Id.* at 1265.

Petitioner also cites *Adler v. Duval County School Board*, 174 F.3d 1236 (11th Cir. 1999), where an Eleventh Circuit panel declared unconstitutional a school policy that permitted graduating seniors to select a class speaker who was then free to deliver a prayer at graduation. However, that decision has since been vacated and the case has been scheduled for rehearing en banc. *Adler v. Duval County School Board*, 1999 U.S. App. LEXIS 13190 (11th Cir. June 3, 1999). Likewise, Petitioner relies on the Ninth Circuit decision in *Doe v. Madison School District*, 147 F.3d 832 (9th Cir. 1998), which was vacated as moot following remand from this Court. *Doe v. Madison School District*, 177 F.3d 789 (9th Cir. 1999). Vacated decisions do not create a circuit conflict.

II. THE FIFTH CIRCUIT CORRECTLY REJECTED THE SCHOOL DISTRICT'S POSITION THAT THE CONSTITUTION PERMITS OVERTLY SECTARIAN PRAYER AT SCHOOL-SPONSORED FUNCTIONS.

The school district in this case challenges the Fifth Circuit's holding that the use of the public address system for "student-initiated" prayers prior to football games is unconstitutional even if the prayer is nonsectarian and nonproselytizing, while student-initiated prayer at graduation ceremonies is constitutional only if it is nonsectarian and nonproselytizing.

Petitioner describes the holding as inconsistent, and it may well be. Throughout this litigation, Respondents have made clear their disagreement with the Fifth Circuit's rule, first announced in *Jones v. Clear Creek Independent School District, supra*, that student-initiated graduation prayer is constitutional so long as it is nonsectarian and nonproselytizing. However, Petitioner does not seek a reaffirmation of *Clear Creek II*. Petitioner challenges *Clear Creek II* because it does not go far enough, because it does not permit students to engage in overtly

sectarian prayer at graduation ceremonies. The Fifth Circuit properly rejected that view, which is plainly inconsistent with this Court's Establishment Clause jurisprudence.

In recent cases, the Court has emphasized that one of the important functions of the Establishment Clause is to ensure that individuals not be made to feel like outsiders in their own community because of their religious views. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 628 (1989) (O'Connor, J., concurring). This Court has also recognized that school children are especially vulnerable to such feelings because they are inherently susceptible to peer pressure, and that it is inherently coercive to put graduating seniors in the position of submitting to that pressure or skipping graduation. *See Lee v. Weisman*, 505 U.S. 577, 593 (1992). The fact that graduation prayer (or prayer before football games) is led by students, does not diminish the pressure to religious conformity, if anything, it may increase it. And the fact that a prayer is overtly sectarian only magnifies the message that there is one truth faith.

As the Fifth Circuit correctly perceived, therefore, this case is not about speech in a genuine public forum. *Jane Doe, et al. v. Santa Fe Indep. School Dist., supra* at 819-821. It is about a school policy deliberately designed to circumvent *Lee* through the use of student surrogates to deliver prayers before a captive audience that school officials can no longer deliver themselves. The effect of such a policy, at the very least, is to promote religion in violation of the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As a result, it is not surprising that

Petitioner cannot point to a single case that goes as far as they now ask this Court to go.

There is no reason to grant certiorari in this matter.

CONCLUSION

For these reasons, the Respondents request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

ANTHONY P. GRIFFIN*
Counsel of Record
ANTHONY P. GRIFFIN, INC.
Lawyers
1115 Moody
Galveston, Texas 77550
409/763-0386
1/800/750-5034

DEBORA PERKEY
Attorney at Law
4012 Avenue O ½
Galveston, Texas 77550
409/750-9221

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No. 99-62

In The

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

vs.

JANE DOE, Individually and as next friend for her minor children, Jane and John Doe, Minor Children; Jane Doe #2, Individually and as next friend for her minor child, John Doe, Minor Child, and John Doe, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

LEON KELLY FRELS*
*Counsel of Record
LISA A. BROWN
REAGAN D. PRATT
BRACEWELL & PATTERSON, L.L.P.
711 Louisiana, Suite 2900
Houston, Texas 77002-2781
(713) 223-2900

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

REASONS FOR GRANTING THE PETITION

I. After the filing of the Petition in this case, the Eleventh Circuit issued a new decision that squarely conflicts with the decision of the Fifth Circuit. This Court should grant the Petition to resolve this circuit court split.

On July 13, 1999, the court of appeals for the Eleventh Circuit upheld a school district's practice of permitting student-initiated prayer at graduation, sporting events, and other school functions. *Chandler v. James*, Nos. 97-6898, 97-6953, 1999 WL 493495, *2-3 (11th Cir., July 13, 1999). In contrast to the Fifth Circuit's decision in *Santa Fe*, the *Chandler* court held that neutral accommodation of student religious speech at school functions is not only permissible, it is *required* by both the Free Exercise and the Free Speech Clauses of the Constitution. *Id.* at *5-6. The law of the Eleventh Circuit now directly conflicts with that of the Fifth Circuit on these important issues of constitutional law.

In *Chandler*, the district court had enjoined school officials from "permitting . . . students to pray or to deliver religious or devotional messages . . . over any public-address system during the instructional day (including the home room period) or in connection with any school-sponsored event," including graduation and sporting events. *Chandler v. James*, 985 F.Supp. 1062, 1064 (M.D. Ala. 1997), *rev'd in part*, Nos. 97-6898, 97-6953, 1999 WL 493495 (11th Cir., July 13, 1999). The same injunction required school officials to discipline students who engage in "enjoined activity." *Id.* The Eleventh Circuit held that the injunction unconstitutionally banned

private, constitutionally-protected religious speech. 1999 WL 493495, at *3.

The *Chandler* court reasoned that, when a school district permits secular speech at student functions, the "discriminatory suppression of student-initiated religious speech demonstrates not neutrality but hostility toward religion." *Id.* at *6. Such an implied disapproval of religion (and its corollary approval of non-religion) offends the neutrality principles developed by the Supreme Court, the court said. *Id.* at *5-6. Moreover, censoring religious content from speech constitutes viewpoint discrimination, "the most egregious form of content-based censorship" prohibited by the Free Speech Clause. *Id.* at *9.

Like the dissent in *Santa Fe*, the Eleventh Circuit agreed that the neutral accommodation of religious student speech does not offend the Establishment Clause and "does not automatically constitute an unconstitutional State endorsement of religion." *Id.* at *6.

> Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's – either by attribution or adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. . . . Religious speech by students does not become forbidden 'state action' the moment the students walk through the schoolhouse door.

Id.

The *Chandler* court similarly concluded that student religious speech does not violate the coercion test of *Lee v. Weisman*, 505 U.S. 577 (1992), because the state itself is not directing the religious speech. Moreover, coercion does not occur merely because a person is subjected to speech that he finds offensive, the court concluded. One result of the freedoms guaranteed in our Constitution is that citizens, at times, must hear messages, both religious and non-religious, that they would rather not hear. *Id.* at *7-8.

As a result of the *Santa Fe* and *Chandler* decisions, speech that is protected in Florida, Alabama, and Georgia is forbidden in Texas, Louisiana, and Mississippi. This is a constitutionally unsupportable result. Given the conflict between these two circuits and the continuing public interest in this issue throughout the nation, further litigation is inevitable. This Court should grant the Petition to resolve this conflict and to bring clarity to this area of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEON KELLY FRELS*
*Counsel of Record
LISA A. BROWN
REAGAN D. PRATT
BRACEWELL & PATTERSON, L.L.P.
711 Louisiana, Suite 2900
Houston, Texas 77002-2781
(713) 223-2900

Attorneys for Petitioner

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(2)

NO. 99-62

In The
SUPREME COURT OF THE UNITED STATES

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, Individually and as next of friend for her minor children, Jane and John Doe, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* FOR STEPHANIE VEGA AND OTHER STUDENTS AND PARENTS OF SANTA FE INDEPENDENT SCHOOL DISTRICT IN SUPPORT OF PETITIONER

KELLY J. COGHLAN
Counsel of Record
COGHLAN & ASSOCIATES
505 Lanecrest, Suite One
Houston, TX 77024-6716
(713) 973-7475
Attorney for Amici Curiae
Students and Parents of Santa Fe Independent School District

32 pp

QUESTION PRESENTED

1. With regard to a student who is selected by fellow students through a fair and secular process devoid of government influence, to speak at a high school event, with control of content vested solely in the individual student, does the First Amendment require the government to censor and/or prevent and/or punish the student for religious utterances when secular speech is allowed; or do the Free Exercise and Free Speech Clauses require the government to permit student religious speech at the same time, and in the same place and manner, as it permits secular speech?

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INTEREST OF *AMICI CURIAE*[1]

Amici include Stephanie Vega and 71 other students and parents in the Santa Fe Independent School District (hereinafter "SFISD").[2] Stephanie Vega was elected by her classmates in

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[1] The parties have consented to the filing of this brief and their consents are submitted herewith. Kelly Coghlan authored the brief in its entirety. No person or entity made a monetary contribution to the preparation or submission of this brief other than counsel for *Amici* and SFISD students and parents who are *Amici* herein. Coghlan is not working for, or on behalf of, any church, religious organization, association, political party, or "special interest" group.

[2] *Amici* include: Maria Vega, individually and as next friend for her minor child Stephanie Vega (10th grade); Jessica Veasey, individually (12th grade); Julie and Tim Finley, individually and as next friends for their minor children Kristin Finley (10th grade) and Laurin Finley (5th grade); Robert and Lynda Janice, individually and as next friends for their minor children Nick Quesada (8th grade) and Jonathon Quesada (5th grade); Bruce and June Ousley, individually and as next friends for their minor children Shannon Ousley (8th grade) and Bryan Ousley (7th grade); Bruce and Julie Terry, individually and as next friends for their minor children Bruce Terry III (11th grade) and Blaine Terry (6th grade); Larry and Karen Griswold, individually and as next friends for their minor children Jana Griswold (12th grade) and Asron Griswold (10th grade); Darrell and Gina Kearley, individually and as next friends for their minor child Baily Chafin (10th grade); Vick and Connie Carrell, individually and as next friends for their minor child Brad Carrell (8th grade); Gerald and Donna Pruitt, individually and as next friends for their minor children Julie Pruitt (11th grade) and Janice Pruitt (9th grade); Lori Whyde, individually and as next friend of her minor child Sarah Whyde (8th grade); Bill and Karen Pennington, individually and as next friends for their minor child Cort Pennington (9th grade); Lylia Patterson, individually and as next friend of her minor children Rick Patterson (11th grade), Ginny Patterson (9th grade), and Gregory Patterson (5th grade); Rick and Karen Vaughn, individually and as next friends for their minor children Daniel Vaughn (9th grade) and Steven Vaughn (5th grade); Susan Wollam individually and as next friend for her minor child Ashley Wollam (9th grade); Kimberly Marsh, individually (12th grade); Audrey Flowers, individually (12th grade); Krystal Benskin, individually (12th grade); Kevin Sawyer, individually (12th grade); Jeremy Ottinger, individually (12th grade); Michael Christian, individually (12th

May, 1999, to deliver a "brief invocation and/or message" (or "statement") before the football games for the upcoming 1999/2000 school year.

Under the Fifth Circuit's decision, Stephanie Vega will be allowed to say virtually anything to formalize the beginning of the SFISD football games for the 1999/2000 school year except a prayer or other religious utterance. Stephanie Vega does not understand why the government has seemingly become so vehemently anti-God, anti-religion, and anti-prayer, and why the State is forcing viewpoint discrimination upon her. The Fifth Circuit has sent a powerful message--that the government disapproves of *Amici* and that *Amici* are outsiders.[3]

Kelly Coghlan was hired by *Amici* to seek governmental neutrality regarding student choice and implementation of a "brief invocation and/or message" (or "statement") at football games and an "invocation and benediction" at graduation services--without judicial censorship, scripting, coaching, or viewpoint discrimination.

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grade); Brett and Leta Ford, individually and as next friends for their minor child Mindy Ford (10th grade); Melinda Hicks, individually and as next friend for her minor child Candace Hicks (10th grade); Don Carroll, individually and as next friend for his minor children Dawn Carroll (12th grade) and Dana Carroll (12th grade); Cindi Brown, individually and as next friend for her minor child Bridgit Brown (12th grade); Jamie Rogers, individually and as next friend for her minor children Jimbo Butler (8th grade) and Ashley Rogers (7th grade); Mettra Poutry, individually and as next friend for her minor child Kim Poutry (10th grade); Aaron Gibson, individually (12th grade); and Jimmy Mayberry, individually and as next friend for his minor child Jimmy Mayberry (10th grade). The grade levels reflect the grades completed in the public schools of SFISD.

[3] If endorsement of religion is unconstitutional because it "sends a message to nonadherents that they are outsiders," disapproval is unconstitutional because it "sends the opposite message." Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

INTRODUCTION AND SUMMARY OF ARGUMENT

The civil liberties of 46,280,000[4] students attending public schools in America are at risk as a result of the Fifth Circuit panel's split-decision in the present case. Shortly after the decision, school districts began requiring students to submit their proposed graduation solemnizations to school officials for editing, to assure viewpoint conformity.[5] Within weeks of the case, another federal circuit was already citing the Fifth Circuit as supporting authority for placing harsh restrictions on the religious liberties of students under its own jurisdiction. See Adler v. Duval County Sch. Bd., 174 F.3d 1236, *vacated*, Nos. 98-2709, 98-2720, 1999 WL 354889 (11th Cir. June 3, 1999, *pending en banc*). The chilling effect caused by the subject case is incalculable, not only affecting students in Texas, Louisiana, and Mississippi, but, potentially, students in public schools across America.

In 1962, state/local legislative branches of government were prescribing and proscribing when, where, and what students

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[4] "Nation-wide more than 52 million children are enrolled in school, from kindergarten through the twelfth grade; 89 percent go to public schools, 11 percent to private schools". NBC Nightly News: NBC News In Depth (NBC television broadcast, Feb. 10, 1999). And the number of secondary school-age students is on the rise: "The U.S. Census Department says the American teen population is on a growth spurt. From 31 million last year to an estimated 50 million by the year 2010." Dateline NBC (NBC television broadcast, July 7, 1999).

[5] Appendix A is the text of high school student Katherine Hackleman's graduation solemnization reflecting the portions unilaterally excised by school officials as unacceptable viewpoint. Hackleman was required to pre-submit her solemnization and disallowed to say those portions marked through by school officials.

Appendix B is the cover page of the Complaint filed in Hackleman v. Aledo Indep. Sch. Dist., No. 499-CV-0416-Y (D. Tex. filed May 20, 1999).

could pray.[6] In 1999, with the advent of the Fifth Circuit's decision, it is now the federal judicial branch prescribing and proscribing when, where, and what students can pray.[7] It is important to *Amici* and the more than 46 million other students attending public schools in America that this Court correct the Fifth Circuit's misinterpretation of the First Amendment.

ARGUMENT AND AUTHORITIES

I. "Message"/"Invocation"/"Benediction"/"Statement" Policies Of SFISD Are Constitutional As Written

The facts do not present a prayer case but rather a student "utterance" case. "Prayer" is not mentioned, much less required or encouraged, under either of the SFISD policies. See Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 812 (5th Cir. 1999). The Fifth Circuit's references to SFISD's policies as "prayer policies" is a misnomer. SFISD's football policy speaks of a "brief invocation and/or message" (or "statement"[8]) to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition;" and the graduation policy speaks of an "invocation and benediction." The definitions[9] of "invocation"

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[6] Engle v. Vitale, 370 U.S. 421 (1962).

[7] Exerting control over the content of students' prayers in one instance and entirely proscribing students' prayers in another.

[8] The Fifth Circuit's opinion reproduces only a portion of the entire football policy. See Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 812 (5th Cir. 1999). The football policy's second and fifth paragraphs, not reproduced in the opinion, use the additional word "statement" to describe the unfettered breadth of student choice over content. See full text of SFISD's football policy in Petition for Writ of Certiorari, app. F.

[9] Webster's Third New International Dictionary (3d ed., Merriam Webster Inc. 1993) at 1190, 203, 1418 & 2229. There is no evidence that SFISD intended variant meanings outside of the definitions. Also see Jones v.

("the action or an act of petitioning for help or support"), "benediction" ("an expression or utterance of blessing or good wishes"), "message," and "statement" have no required prayer or religious component.[10]

Under the SFISD policies,[11] a prayer might never be uttered (*a fortiori*, from year to year, students may decide to have no student solemnizations at all). The terms "invocation," "benediction," "message," and "statement" are so broadly defined in the dictionary as to include virtually any viewpoint, utterance, or communication. Unlike Ingebretson v. Jackson Pub. Sch. Dist., 88 F.3d 274 (5th Cir.), *cert. denied*, 519 U.S. 965 (1996), nowhere do the SFISD policies allow school officials to "decide who prays and which prayers qualify" (Id. at 278), "inform students...that they can pray" (Id. at 279), "review the content of prayers" (Id.), or "determin[e] who gets to say the prayer at each event" (Id.); nor do the SFISD policies allow prayers to be given by "teachers, school administrators, and clergy at school functions" (Id.). Under the SFISD

Clear Creek Indep. Sch. Dist., 977 F.2d 963, 969 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) ("Clear Creek II") ("But the Resolution permits invocations free of all religious content...."). As much as the Fifth Circuit would like to include the word "prayer" or "religion" into SFISD's policies, the definitions of the words in the policies do not support such inclusion.

[10] "Welcome. We ask everyone to do their part in helping to assure a safe game by observing good sportsmanship, both on the field and in the stands. May we be blessed with good weather and no injuries. Good luck to both teams." These remarks meet all four definitions of the terms used in the SFISD policies, yet have no religious component.

[11] Both polices in issue were enacted by the 1995 SFISD School Board. The district court found that "SFISD had abandoned any [previous] potentially problematic policies." See 168 F.3d at 813. There is no evidence implicating the 1995 SFISD School Board of any unconstitutional motivations in passing the two 1995 policies in issue (indeed, the policies were passed pursuant to district court orders and under the district court's watchful eye--See 168 F.3d at 811-812).

policies, students singularly decide whether to have any student solemnizations for the year, which students will give the solemnizations,[12] and the content of solemnizations. SFISD has no part in making any of these decisions.[13]

The Fifth Circuit is factually incorrect in its' assertion that "school officials [of SFISD] are present and have the authority to stop the prayers." 168 F.3d at 823. The text of the policies do not support this contention; there is no evidence in the record to support this position; and, *a fortiori*, the district court's order of May, 1995 makes it clear that such is not the case: "SFISD should play no role in selecting the students or scrutinizing and approving the content of the invocations and benedictions." 168 F.3d at 811. "Once the class of elected student speakers is chosen, SFISD maintains no power, discretionary or otherwise, to bar any duly chosen speaker from accomplishing his task." Id. at 831 (Jolly, J., dissenting).[14]

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[12] Contrary to the Fifth Circuit's implication of exclusivity, (see 168 F.3d at 820), the pool of potential speakers under the graduation policy includes every senior; and under the football policy, every student. Under both policies, any and all students in the respective pools are eligible to volunteer to be selected by students. See Petition For Writ of Certiorari, apps. F, G (SFISD's graduation policy and football policy).

[13] Both policies facially provide neutral accommodation of student decisions regarding solemnizations which students choose without endorsement, coercion, or entanglement by the district (the content of which the school board neither scripts, supervises, endorses, suggests, or edits).

[14] Thus, if SFISD stopped a solemnization based on viewpoint discrimination, students would, no doubt, have legal recourse against SFISD for violating the district court's orders, breaching its own SFISD written policies, and violating students' constitutional rights. SFISD has never interrupted or stopped a students' remarks (prayer or otherwise) under either policy.

II. Solemnization As Historically Practiced In America Does Not Support Fifth Circuit's Rationale

The Fifth Circuit's rationale for mandating viewpoint discrimination at football games is that such games are "hardly the sober type of annual event that can be appropriately solemnized with prayer." 168 F.3d at 823.

Webster's Third New International Dictionary (3d ed., Merriam Webster Inc. 1993) at 2168, defines "solemnize" as: "1: to hold, conduct, observe, or honor with due formal ceremony or solemn notice." The definition has no restricted applicability to only events which themselves are "a sober type of annual event" or "singularly serious" or "nurturing," as the Fifth Circuit so narrowly confines the meaning of the term. 168 F.3d at 823.

Eating a meal would not fit within the Fifth Circuit's definition of an event that "can be appropriately solemnized with prayer," and yet, millions pray daily to solemnize the routine occasion of eating. Thousands of Rotary Clubs and similar organizations assemble weekly to eat and meet, and yet these secular organizations solemnize these common, non-ceremonial events with vocal prayer. Rodeos and other secular sporting events routinely open with vocal prayer. Congress solemnizes every session with vocal prayer, not merely its special ceremonial occasions.[15] Each day a federal court is in session is not necessarily a "singularly serious" day of solemn ceremony (nor an "annual event"), yet a law clerk opens with a vocal solemnization that ends with the prayer, "God, save the United States and this Honorable Court."[16]

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[15] Marsh v.Chambers, 463 U.S. 783, 786 (1983).

[16] Lee v. Weisman, 505 U.S. 577, 635 (1992) (Scalia, J., dissenting); County of Allegheny v. ACLU, 492 U.S. 573, 630 (1989); Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J. concurring); Zorach v.

Why should courts restrict students' solemnizations that mention "God" to only once-in-a-lifetime events, when federal courts do not restrict their own use of daily vocal solemnizations (containing a prayer comprised of two supplications to "God") to the same standard.[17]

Throughout America's history, prayer has been used to solemnize activities ranging from the mundane to the sublime--including high school football games. When we are interpreting the Constitution, "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Justice Holmes).

III. Secular Purposes of Solemnization In Schools Support Constitutionality Of SFISD's Policies

In public schools, there are student activities having natural beginnings and ending--such as graduations and football games. Just prior to the beginning of these activities, there is usually noise, walking around, talking and such. Attaining attention, silence, and focus normally entails some act to mark the beginning of the occasion. In America, solemnization has traditionally been utilized for this purpose. Methods of solemnization vary, but all generally provide a moment conducive to reflection, focusing, and calming.[18]

Clauson, 343 U.S. 306, 313 (1952).

[17] *A fortiori*, citizens required to be present before federal courts are "captive audiences" to the solemnizations; and these are government sponsored solemnizations.

[18] While ceremonial prayer is one method of solemnization, it certainly is not the only method. A moment of silence, reading a quote, singing the National Anthem, reciting the Pledge of Allegiance, offering words of welcome, and various other methods have been used as techniques of solemnization, and are all available for use by students as "invocations," "benedictions," "messages," and/or "statements" under SFISD's graduation and football policies. A targeted elimination of one method of

Justice O'Connor has written that "acknowledgements" such as, *inter alia*, "prayers...serve in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."[19]

It is axiomatic that in the absence of students there would be no football games or graduations. These events exist primarily for the students, not primarily for school officials or judges. There is therefore no compelling reason for school officials or judges to be involved in conducting or scripting solemnizations of student activities when students are desirous and capable of doing this themselves. Permitting students choice concerning the issue of brief solemnizations of some of their own student activities does not put the government in a position of endorsing anything other than student choice.

There are educational benefits to allowing students the opportunity of deciding for themselves how, when, if, and by whom, they wish to solemnize, formalize, and dignify some of their own school activities. Placing this responsibility on high school students provides educational opportunities in, *inter alia*, speech, civics, government, and constitutional law.[20]

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solemnization on the basis of religious content is not in keeping with "a course of 'neutrality' toward religion" (quote from Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973)).

[19] Lynch, 465 U.S. at 692-693 (O'Connor, J., concurring). Implicit in this statement, is that ceremonial solemnization is not intended to, nor does it, have the primary effect of attracting new converts or advancing religion. The undersigned has been unable to document a single historical instance of revival breaking out as a result of a short ceremonial prayer at a high school football game or graduation ceremony.

[20] Students who are selected by students to conduct the solemnizations must author, prepare, practice, and deliver a short public address, thereby providing educational opportunities in speech and presentation. Exposure

There are as many secular reasons supporting the appropriateness of solemnizing football games (with prayer as an available option) as there are supporting solemnizing graduations (with prayer as an available option); albeit different reasons. High school football games regularly involve long standing rivalries between schools and towns. These games present great potential for conflict, disagreement, dissension, danger, and violence between opposing fans.[21]

A moment of quiet solemn expression (traditionally a prayer) has historically gone far to soothe turbulent atmospheres at high school football games.[22] This is an

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to diverse student solemnizations can be educational for those listening, also promoting tolerance of other's ideas and expressions. The voting and implementation process provides all students with learning opportunities in civics, government, and constitutional law. These are all educational subjects worthy of hands-on learning in high school. Rather than merely learning about these subjects academically, the process involves the students in the operation, exercise, and practice of the subjects.

[21] Who among us has not witnessed (in person or via media) some form of verbal or physical acts of aggression or violence between fans of opposing teams at sporting events--especially at high school football games.

[22] In Longview, Texas, during the 1970/71 school year (when the all black Womack High School was merged, under federal court order, with Longview High School) the undersigned was a senior. It was a time of tension, fear, fights, and violence. The bloodiest and most widespread fighting of the year occurred on a Friday afternoon before a high school football game. Although school officials broke up the near riot, there were injuries, and the rumor was that the racial violence would continue at the football game that night and that blacks and whites were organizing for the confrontation. Before the beginning of the game, the tension was palpable. When it was time to start the opening formalities, the President of the Student Council began a prayer over the public address system (specifically addressing the black/white issues--how all are equal, how love of each other must prevail, asking for peace and blessings on all, and seeking God's intervention). The mood changed, tension melted, and there was a calm which continued throughout the game with no fights or confrontations.

Is there less of a need today for student solemnization (with prayer

important tradition which has, throughout the years, fostered calm, reflection, good behavior, and safer games.

IV. Students' Religious Expression, As Opposed To Governments' Religious Expression, Is Protected Speech

The Fifth Circuit fails to adequately distinguish between government speech and private speech. While government sponsored prayer in public schools is unconstitutional,[23] the Court has never prohibited genuinely student initiated prayer in public schools. The sole focus of the Religion Clauses of the First Amendment is on what "Congress" (all levels of government) cannot do; not on what private citizens (students) cannot do. The "wall of separation between church and state" is not a wall between religious and non-religious students but is a wall between the government and all students.[24] The

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included as an option) than in 1970? Have the schools of 1999 become so much calmer and safer than the schools of 1970: Pearl, Mississippi, October 1, 1997, two dead, seven wounded; West Paducah, Kentucky, December 1, 1998, three dead, five wounded; Jonesborough, Arkansas, March, 1998, five dead, ten wounded; Springfield, Oregon, May, 1998, four dead, twenty-one wounded; Richmond, Virginia, May, 1998, two wounded. Dateline NBC: Gunfire At Armstrong High (NBC television broadcast, Sept. 25, 1998). Littleton, Colorado, April 20, 1999, fifteen dead, twenty-three wounded; Conyers, Georgia, May 20, 1999, six wounded.

Barry Mano, President of the National Association of Sports Officials, states, "We are getting more reports than ever in the history of the organization with regard to referees being assaulted." 20/20 (ABC television broadcast, May 30, 1999).

More, not fewer, solemnization opportunities are needed in public schools to foster an atmosphere of calm, focus, and composure, with the goal of producing safer sports events and safer schools.

[23] Engle, 370 U.S. 421.

[24] As long as members of the government (including the judiciary) do not "jump over the wall" and attempt to influence students' religious expressions (either instigating or stifling) the "wall" is not breached.

Constitution prevents governments' pro-religious acts (Establishment Clause), but protects students' pro-religious acts (Free Exercise and Free Speech Clauses). As stated in Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226, 250 (1990):

> [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support [religious] student speech that it merely permits on a non-discriminatory basis.

In Chandler v. James, Nos. 97-6898, 97-6953, 1999 U.S. App. Lexis 15608, at 4-5 (11th Cir. July 13, 1999), the court generally adopts the school district's position:

> First, students are not state actors and, therefore, by definition, their actions cannot tend to "establish" religion in violation of the Establishment Clause. Second, the Free Speech and Free Exercise Clauses of the First Amendment require the State to *tolerate* genuinely student-initiated religious speech in schools.

If student speech incidentally advances religion in some sense, this does not violate the Establishment Clause since student speech is, by definition, private speech: "[T]o have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." Corporation of Presiding Bishop of

the Church of Jesus Christ v. Amos, 483 U.S. 327, 337 (1987); also see Mergens, 496 U.S. at 250.

However, if a school district requires, that student speech be religious, this is what violates the Establishment Clause.[25] "It is not the 'permitting' of religious speech which dooms their policies, but rather the *requirement* that the speech be religious...." Chandler, 1999 U.S. App. Lexis 15608, at 5. Merely permitting students to verbalize religious ideas signifies neither State approval nor disapproval of the speech but only the State's acknowledgment of its' constitutional duty to tolerate religious expression.[26] Only in this way is true

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[25] For instance, school officials delegating surrogates to do what the school officials themselves may not do directly--such as selecting clergy or students for the specific purpose and express task of praying at school events (Lee, 505 U.S. at 577; Karen B. Treen, 653 F.2d 897 (5th Cir. 1981)); or, permitting private parties to speak but then limiting the speech to a prayer or other religious speech (Ingebretsen, 88 F.3d at 277; Hall v. Board of Sch. Comm'rs, 656 F.2d 999 (5th Cir. 1981); Collins v. Chandler Unified Sch. Dist., 644 F.2d 759, 760-61 (9th Cir. 1981)).

[26] Government acquiescence to brief use of school public address systems for students to solemnize (which might never include prayer) is de minimis state action and the slightest act of neutral accommodation by the government.

But, the Fifth Circuit contends: "Prayers that a school 'merely' permits will still be delivered to a government-organized audience, by means of government-owned appliances and equipment, on government-controlled property, at a government-sponsored event, thereby clearly raising Establishment Clause concerns." 168 F.3d at 817. However, if this were the test, Lee would have been a short opinion indeed (since all of these same factors existed in the Lee graduation); and Clear Creek II and Chandler and all of the Supreme Court's "neutral accommodation" cases would be wrong. Denying students the use of government-owned equipment on the basis of viewpoint discrimination is antithetical to "neutral accommodation." The First Amendment does not require the "government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." Zorach, 343 U.S. at 314. Also see Mergens, 496 U.S. at 250 ("a school does not endorse or

neutrality observed. SFISD does not require, either directly or indirectly, that student speech be religious. If a solemnization is religious, it is only because a student has independently decided that it be so.

The last time the Supreme Court directly addressed the subject of school prayer was in Lee v. Weisman, 505 U.S. 557 (1992).[27] A close reading of Lee reveals that SFISD's policies are constitutional. In Lee, the Court invites non-government

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support [religious] student speech that it merely permits on a non-discriminatory basis"); also see e.g., Chabad-Lubavitch of Georgia v. Miller, 5 F.3d 1383, 1391-1392 (11th Cir. 1992) (*en banc*) ("the failure to censor is not synonymous with endorsement").

Government's tolerance of disbelief does not require atheism to be elevated over belief. The First Amendment requires only that the State tolerate both, while establishing neither. Students, however, are free to prefer one or the other and to express that preference whenever they are permitted to speak. "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." Lynch, 465 U.S. at 692 (O'Connor, J., concurring) (emphasis added).

[27] In Lee, a principal unilaterally decided to have prayer at graduation; selected the person to pray; selected a clergyman; and directed the clergyman to pray according to guidelines provided by the principal. In a five to four decision, the Court came within one vote of holding that even this degree of government involvement was constitutional. In Lee, not only was the vote close, but the holding was narrow. Although the Lee Court had the opportunity to hold that any and all prayer at public school events would violate the Constitution, the Court did not do so, but rather held that only the particular circumstances of that case were unconstitutional, stating: "These dominant facts mark and control the confines of our decision....Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one....Our jurisprudence in this area is of necessity one of line drawing." Lee, 505 U.S. at 586, 597, 598 (emphasis added); also see Lynch, 465 U.S. at 678 ("In each case, the inquiry calls for line-drawing...."). Slightly different facts can be outcome determinative in First Amendment cases: See Lynch, 465 U.S. at 681-82; compare with Allegheny, 492 U.S. at 598-600. Also see Clear Creek II, 977 F.2d at 965 & n.4.

persons (obviously, in the context of the school prayer case, referring to students) to undertake the "task" of formulating "prayers":

> If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.
>
> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.

Id. at 588 (emphasis added).

This language strongly suggests that schools permit the student body "to undertake that [prayer] task for itself."[28]

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[28] Although the Court gives no guidance as to which students should "undertake the task," a school-wide decision involving all students would seem to be the most equitable. This allows districts to be outcome-neutral and communicates to students and to the community that the district is not endorsing, coercing, or entangling itself with the decision, selection of student(s), or content of solemnizations.

When it is widely known, as in SFISD, that the presence and content of student solemnizations are of student choice, the issue of perceived government endorsement is dispelled as "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer" rather than that of "the casual passerby." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 773 & 779-780 (1995) (O'Connor, J., concurring). But, even a casual passerby should draw no more of a conclusion of government endorsement of religion if a student should say a prayer then

Regarding such efforts by students, the Court directs that "the First Amendment does not allow the government to stifle prayers which aspire to these ends." Id. **If students are never allowed by the schools or courts to attempt the "task," then these words in Lee are meaningless.** Student initiated solemnization is a step toward what Lee suggests, and SFISD was simply following these Lee directives.

The above quote from Lee is in accord with other Supreme Court decisions which collectively lend further support to the constitutionality of SFISD's student solemnization policies.[29]

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the same passerby should draw a conclusion of government hostility toward religion if a student should say no prayer.

[29] (1) "It can hardly be argued that...students...shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969).

(2) Government may not favor one speaker over another based on substantive content. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys...[or] favor one speaker over another. Discrimination against speech because of its message is presumed unconstitutional....Viewpoint discrimination is thus an egregious form of content discrimination"). Government may not discriminate based on viewpoint in even a non-public forum. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

(3) Governmental accommodation of religion is constitutionally mandated: "Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." Lynch, 465 U.S. at 673 (emphasis added); also see Widmar v. Vincent, 454 U.S. 263, 273-74 (1981); Nyquist, 413 U.S. at 792-93; Zorach, 343 U.S. at 312-315.

(4) Ceremonial prayer serves the valid secular purpose of solemnization. Alleghany, 492 U.S. at 595-596 n.46; Id. at 630 (O'Connor, J., concurring); Lynch, 465 U.S. at 693 (O'Connor, J., concurring); see also e.g., Engel, 370 U.S. at 435 n.21.

And, a number of federal appellate panels have followed the Lee pronouncements.[30]

A judicial dictate of "no student prayer at football games" is just as wrong as a judicial dictate requiring student prayer at football games--both are extremes of the same wrong and equally non-neutral. A judicially prescribed "equal silence for all" is not neutral as such rule singularly prefers and advances the "atheists' religion of silence." "That would be preferring those who believe in no religion over those who do believe." Zorach, 343 U.S. at 314. "Cleansing" our public schools of religious expression inevitably results in the "establishment" of disbelief--atheism--as the States' religion. As President William Clinton said, while speaking on the topic of religious liberties in public schools:

> The First Amendment, I will say it again, does not convert our schools into religion-free zones....[and] does not require students to leave

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[30] (1) Clear Creek II, 977 F.2d 963--recognizes the critical difference between government-initiated and student-initiated prayer: "[A] majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies." Id. at 972.

(2) Doe v. Madison Sch. Dist., 147 F.3d 832 (9th Cir. 1998), *vacated as moot*, No. 97-35642, 1999 WL 317050 (9th Cir. May 19, 1999)--holds constitutional a policy in which the four top academically-ranked graduates were invited to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement" at graduation. Id. at 834.

(3) Chandler, 1999 U.S. App. Lexis 15608--holds invalid a district court's injunction that prohibited a school district "from permitting [student] vocal prayer or other devotional speech in its schools...such as aloud in the classroom, over the public address system, or as part of the program at school-related assemblies and sporting events, or at a graduation ceremony." Id. at 3. The district court "may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech." Id. at 13.

> their religion at the schoolhouse door.... It protects freedom of religion by allowing students to pray, and it protects freedom of religion by preventing schools from telling them how and when and what to pray.[31]

V. Judicial Censorship And Scripting Of Students' Religious Expressions Violates Students' Consciences, Amounts To Viewpoint Discrimination, And Creates A Preferred State Religion

Permitting only "non sectarian/non proselytizing" prayers creates a preferred creed and official "civic" religion of the court's invention[32] (permitting students to "speak only the religious thoughts that government want[s]...[students] to speak and to pray only to the God that government wants [students] to pray to"[33]).[34] The courts must then police and monitor the new judicially created sect to assure adherence to its strict dogma and to punish aberrant utterances.[35] For the government to dictate that a student cannot pray a prayer

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[31] President William J. Clinton, James Madison High School, Vienna, Virginia, in Office of the Press Secretary (The White House, July 12, 1995).

[32] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion...." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (emphasis added).

[33] Engel, 370 U.S. at 435.

[34] The Fifth Circuit's idea, however, is not original, even to this century. The religion of worshiping at the altar "To An Unknown God" dates back thousands of years to Athens, Greece. See *Acts* 17:22-23 (The history of Paul's travels in Athens).

[35] Mergens, 496 U.S. at 253 ("[A] denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech...."); also see Widmar, 454 U.S. at 272 n.11 (1981); Madison, 147 F.3d at 838.

containing the words of his/her own choice[36] will not only cause the student to violate his/her conscience, but, as to at least one religion, will cause the student to violate a basic tenet of his/her faith.[37]

The idea of a person being "offended" by the expression of another's prayer may simply be a euphemism for intolerance.[38] Silencing prayer is not the answer; tolerance is the answer. And if tolerance can be learned, practiced, and promoted as a result of student solemnization, students will finish their high school years better prepared for life.

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[36] The Fifth Circuit's requirement that students' prayers at graduations be "nonsectarian and non-proselytizing" is little different than the principal's requirement of clergy in Lee. The Lee Court found that by advising the speaker to deliver "nonsectarian" prayers, the principal "directed and controlled the content of the prayers." Lee, 505 U.S. at 588. Also see Ingebretson, 88 F.3d at 279 (School officials' involvement in determining which prayers are "nonsectarian and non-proselytizing...excessively entangles government with religion").

[37] The phrase, "in Jesus' name" is not a tag line added to proselytize or offend. When Christians use this phrase, they are obeying a basic tenet of their faith. *John* 16:24, 26, 27; also see *John* 14:13-14, 15:16; *Colossians* 3:17.

[38] "In this country, it seems to me that we are ruled by the tyranny of the sensitive." Bill Moyer, Politically Incorrect (ABC television broadcast, June 16, 1999).

If a student elects to say a prayer as his/her choice of "message," "invocation," "benediction," or "statement," any person not agreeing with the student's selection is not compelled to stand, bow their head, close their eyes, or otherwise participate. This is similar to the situation regarding Jehovah's Witnesses who believe that it is morally and religiously wrong for them or anyone else to say the Pledge of Allegiance--although the Pledge (which contains the assertion that we are "one nation under God") is routinely said in public schools over public address systems to "captive audiences" of children belonging to this religion. Those not believing in the Pledge are not required to stand, salute, listen, or otherwise participate; but we continue saying the Pledge. See Barnette, 319 U.S. 624.

VI. CONCLUSION

Amici Curiae respectfully request the Court grant SFISD's Petition for Writ of Certiorari and thereafter reverse the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

KELLY J. COGHLAN
Counsel of Record
COGHLAN & ASSOCIATES
505 Lanecrest Lane, Suite One
Houston, Texas 77024-6716
(713) 973-7475

Attorney For *Amici Curiae*
Students and Parents Of Santa
Fe Independent School District

Dated: August 4, 1999

APPENDIX

APPENDIX A

~~Heavenly~~ God ~~Father~~ we come before you today to thank ~~You~~ for bringing us to this great occasion. Thank you for leading, guiding and protecting each and every one of us. ~~Thank you for having a plan to prosper us and not to harm us. Lord as we open this ceremony we recognize before you our sins and ask you to forgive us.~~ As Our life now opens before us and we must now accept responsibility for our decisions. ~~Help us to lean on you for direction and follow in your footsteps.~~ Thank you for your love ~~from you.~~ Help the class of 1999 to move in ~~the world~~ in strength and love for others. ~~Let us take on the likeness of you and~~ set an example for the world to follow. Thank you for your love and thank you for your guidance and protection each and every moment. ~~We love you.~~

[redacted]

Amen

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 499-CV-0416-Y

KATHERINE HACKLEMAN,

Plaintiff,

vs.

ALEDO INDEPENDENT SCHOOL DISTRICT,

Defendant.

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

KATHERINE HACKLEMAN, individually, hereinafter referred to as "Plaintiff," complains of **THE ALEDO INDEPENDENT SCHOOL DISTRICT,** hereinafter referred to as "Defendant," and say:

I.

THE PARTIES

A. The Plaintiffs

1.1 KATHERINE HACKLEMAN is an individual over 18 years of age residing in Weatherford, Texas, and is a student who is graduating from high school in the Aledo Independent School District.

1.2 At all material times herein, **KATHERINE HACKLEMAN** was a student properly enrolled in high school within the Aledo Independent School District which is operated by the Aledo Independent School District in Aledo, Texas.

B. The Defendant

1.3 THE ALEDO INDEPENDENT SCHOOL DISTRICT (hereinafter referred to as "AISD" or the "District") is an independent school district authorized by and constituting a . . .

* * * *

Supreme Court, U.S.
FILED
AUG 6 1999
OFFICE OF THE CLERK

(3)

No. 99-62

In the Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,
v.
JANE DOE, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* STATE OF TEXAS, ATTORNEY GENERAL OF TEXAS JOHN CORNYN, GOVERNOR OF TEXAS GEORGE W. BUSH, STATES OF ALABAMA, COLORADO, KANSAS, LOUISIANA, MISSISSIPPI, NEBRASKA, SOUTH CAROLINA, AND TENNESSEE IN SUPPORT OF PETITIONER

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Atty General

LINDA S. EADS
Deputy Attorney General
for Litigation

GREGORY S. COLEMAN
Solicitor General

JULIE CARUTHERS PARSLEY
Deputy Solicitor General
Counsel of Record

MEREDITH B. PARENTI
Assistant Solicitor General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1896

COUNSEL FOR *AMICI*

25 pp

JOHN CORNYN
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711

GEORGE W. BUSH
Governor of Texas
P.O. Box 12428
Austin, TX 78711

BILL PRYOR
Attorney General of Alabama
Alabama State House
11 South Union Street
Montgomery, AL 36130

KEN SALAZAR
Attorney General of Colorado
Department of Law
1525 Sherman Street
Denver, CO 80203

CARLA J. STOVALL
Attorney General of Kansas
301 S.W. 10th Avenue
Topeka, KS 66612-1597

RICHARD P. IEYOUB
Attorney General of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

MIKE MOORE
Attorney General of Mississippi
P.O. Box 220
Jackson, MS 39205

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, NE 68509

CHARLES M. CONDON
Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29201

PAUL G. SUMMERS
Attorney General and Reporter of
Tennessee
423 Fifth Avenue North
Nashville, TN 37243

STATEMENT OF *AMICI* INTEREST

The State of Texas, Texas Attorney General John Cornyn, Texas Governor George W. Bush, and the States of Alabama, Colorado, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, and Tennessee, appear as *amici curiae* and urge the Court to grant this petition. *Amici curiae* have an interest in this case because the Fifth Circuit's judgment will require governmental officials to review and essentially censor student-initiated and student-given speech even though there is no state involvement in the decision that the speech occur or in the selection of the speaker. *Amici*'s interest here is substantial and direct, because the holding will emanate far beyond public school sponsored events. Under this decision:

- Officials will be required to abandon their roles as neutral observers of religious speech and instead take up their pens as editors and censors.

- Officials must enforce and defend these unprecedented requirements.

- Officials, in enforcing and defending the *Santa Fe I.S.D.* requirements, will be compelled to endorse certain types of religious speech resulting in deep state entanglement with religion.

- Officials will be forced to discriminate against any religious viewpoint that is not nonsectarian and nonproselytizing.

This decision places states in an untenable, unacceptable, and unconstitutional position, despite established precedent to the contrary. In addition, since the petition was filed, the Eleventh Circuit decided *Chandler v. James*, Nos. 97-6898,

97-6953, 1999 WL 493495 (CA11 July 13, 1999), which directly conflicts with the Fifth Circuit's decision in *Santa Fe I.S.D.* In a factually similar case involving student-initiated speech at graduation and sporting events, the Eleventh Circuit held that "genuinely student-initiated religious speech is private speech endorsing religion" and is "fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution." *Id.* at *6. The Court should grant certiorari to address these important issues and resolve this split in the circuit courts.

The parties have given their consent to the filing of this brief, as shown in the letters of consent that accompany this brief. SUP. CT. R. 37.2(a).

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SUMMARY OF THE ARGUMENT

To everything, turn, turn, turn,
There is a season, turn, turn, turn,
And a time to every purpose under heaven.

If a student speaker uses this quote in a graduation invocation, would it be considered nonsectarian and nonproselytizing because it is from a rock song,[1] or would it be considered sectarian and proselytizing because it is from the Old Testament?[2] Would the fact that the quote refers to "heaven" immediately make it off limits? Or maybe it could pass muster because, in reality, the song protests the Vietnam War instead of promoting religious values.

If the Fifth Circuit's decision in *Doe v. Santa Fe I.S.D.*[3] stands, school officials will suffer the Promethean punishment of being forced again and again to judge, and ultimately censor, the content and message of student-initiated speech. This result "achieves the jurisprudentially rare result of offending not only one, but three provisions within the First Amendment." *Santa Fe I.S.D.*, 168 F.3d at 825 (Jolly, J., dissenting). The Fifth Circuit's decision also directly conflicts with the Eleventh Circuit's recent decision in *Chandler v. James*, Nos. 97-6898, 97-6953, 1999 WL 493495 (CA11 July 13, 1999), which reversed a district court's injunction prohibiting vocal prayer or other devotional speech at school

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[1] These are the opening lyrics from the song *Turn, Turn, Turn* by The Byrds.

[2] Ecclesiastes 3:1, reads: "To everything there is a season, and a time to every purpose under the heaven." *Ecclesiastes* 3:1 (King James). The song is taken from Ecclesiastes 3:1-8.

[3] *Doe v. Santa Fe I.S.D.*, 168 F.3d 806 (CA5 1999), *petition for cert. filed* (U.S. July 6, 1999) (No. 99-62).

events. The *Chandler* court rejected the argument that the state has a positive duty to censor student speech if it is religious. *Id.* at *5. The Court should grant the petition to resolve this split among the circuits and prevent the Fifth Circuit's constitutionally defective rule from becoming precedent.

ARGUMENT

I. THE FIFTH CIRCUIT'S OPINION PLACES SCHOOLS IN AN UNTENABLE, UNACCEPTABLE, AND UNCONSTITUTIONAL POSITION.

A. The Establishment Clause Requires Officials to Be Neutral Towards Religion.

Neutral accommodation of religion is a consistent thread running throughout Establishment Clause jurisprudence.[4] From the 1947 decision in *Everson v. Board of Education*[5] to the recent case of *Lee v. Weisman*,[6] the Court has instructed that, in all things, the state must be neutral to religion, neither advancing nor inhibiting it.

- "[The Establishment Clause] requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them." *Everson*, 330 U.S. at 18.

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[4] *See* Richard S. Vacca, et al., Commentary, *Accommodation of Religion Without Establishment of Religion*, 115 Ed. Law Rep. 9 (West 1997).

[5] *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

[6] *Lee v. Weisman*, 505 U.S. 577 (1992).

- "The government must be neutral when it comes to competition between sects." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).
- "The First Amendment leaves the Government in a position not of hostility to religion but of neutrality." *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring).
- "In the relationship between man and religion, the State is firmly committed to a position of neutrality." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963).
- "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. The proposition that schools do not endorse everything they fail to censor is not complicated." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (citations omitted).
- "Nearly half a century of review and refinement of Establishment Clause jurisprudence has distilled one clear understanding: Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution." *Lee*, 505 U.S. at 599 (Blackmun, J., concurring).

Despite the "clear understanding" that the Constitution demands that the state neutrally accommodate all religious (and nonreligious) speech, *see id.*, the Fifth Circuit's decision

in *Santa Fe I.S.D.* plunges school districts into a quagmire of minute and exacting decisions over whether potentially religious[7] speech meets the court's nonsectarian, nonproselytizing criteria.

By holding that the *only* way that the Santa Fe I.S.D. policies can be squared with the Constitution is to require that student-initiated speech be nonsectarian and nonproselytizing, the Fifth Circuit requires school officials to cast aside their roles as neutral observers of student-initiated religious speech and don the hat of editor/censor. The Fifth Circuit reaches this conclusion despite this Court's holdings that state review of prayer results in excessive entanglement. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995); *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971); *see also Ingebretsen v. Jackson Pub. Sch. Dist.*,88 F.3d 274, 278 (CA5), *cert. denied*, 519 U.S. 965 (1996).

Moreover, government-written or sponsored prayers, no matter how bland or ecumenical,[8] unquestionably violate the

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[7] The Santa Fe school district's policies do not require the speech to be religious, because, as Judge Jolly notes in his dissent, "[n]either the dictionary definitions cited by the majority nor our own precedents require an interpretation of 'invocation' or 'benediction' grounded in religion." *Santa Fe I.S.D.*, 168 F.3d at 831 (Jolly, J., dissenting).

[8] The Fifth Circuit's insistence that school districts can be entangled in religious speech as long as it is nonsectarian and nonproselytizing is difficult to understand. It is not the content of the religious speech that ran afoul of the Establishment Clause in *Engel* and *Lee*, it was the government's role in endorsing or proscribing the speech that was unconstitutional.

> Though the efforts of the school officials in this case to find common ground appear to have been a good-faith attempt to recognize the common aspects of religions and not the divisive ones, our precedents do not permit

Establishment Clause. *Engel*, 370 U.S. at 425-34. But is there any logical distinction between government-written prayers and government-edited and censored prayers? Indeed, it is difficult to conceive of a policy more inimical to neutrality than one that requires school officials to review and edit student-initiated religious speech to ensure that it meets state-defined criteria.

And, as a practical matter, how will school districts enforce these requirements?[9] What if the graduation keynote speaker, a non-student, without warning school administrators, passionately advocates that Jesus Christ should take the central role in a person's life? Would the speech violate *Santa Fe I.S.D.*? Assuming that it would, does that mean that the school officials must review every speaker's remarks for religious content and state censure? Or are officials only required to review student-given invocations or benedictions? Not only will this requirement excessively entangle school officials with

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> school officials to assist in composing prayers as an incident to a formal exercise for their students. And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored.

Lee, 505 U.S. at 590 (citing *Engel*, 370 U.S. at 425)).

[9] In *Chandler*, the district court answered this question by enjoining the students' religious speech and ordering that, should any student violate the injunction, school officials must "take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of the violative conduct as it occurs and to deter similar conduct in the future." *Chandler v. James*, 985 F.Supp. 1062, 1064 (M.D. Ala. 1997), *aff'd in part and vacated in part*, Nos. 97-6898, 97-6953, 1999 WL 493495 (CA11 July 13, 1999).

religion, but it will place an incredible burden on state institutions and officials who know too well that an out-of-place phrase with questionable content could result in litigation. Rather than face this Herculean task, many schools may prohibit all student speech having the potential for religious content. This result, however, is no less constitutionally infirm.

The Santa Fe I.S.D. graduation policy[10] and football policy[11] succeed in safeguarding governmental neutrality toward student-initiated, potentially religious speech. Indeed, the policies do not even require a prayer at all, but allow students to determine what message, if any, to deliver without official oversight.[12] Requiring school officials to censor

[10] *See Santa Fe I.S.D.*, 168 F.3d at 811-13.

[11] *See id.* at 812.

[12] The Fifth Circuit mistakenly concludes that the Santa Fe policies only allow students to deliver "very circumscribed statements that under any definition are prayers." *Id.* at 820. But the graduation policy allows students to deliver an "invocation" or "benediction," which are not necessarily prayers, while the football policy allows students to give an "invocation" or "message." Petition for Writ of Certiorari at 4, 6, App. F, App. G, *Santa Fe I.S.D. v. Doe*, (U.S. July 6, 1999) (No. 99-62). According to Webster's, the definition of "invocation" includes "the act or process of petitioning for help or support . . . a prayer of entreaty . . . a calling upon for authority or justification . . . a formula for conjuring: INCANTATION . . . [and] an act of legal or moral implementation: ENFORCEMENT." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 637 (1983). The definition of "benediction" is "an expression of good wishes . . . the invocation of a blessing . . . [and] something that promotes goodness or well-being." *Id.* at 143; *see also supra* note 7 (noting Judge Jolly's dissent on this issue). Regardless of the definition, however, the fact remains that students not only determine whether to have an invocation, benediction, or any message at all, but they also decide what the content of their message will be.

potentially religious speech not only destroys neutrality, but requires the school districts to engage in constitutionally forbidden viewpoint discrimination.

B. The *Santa Fe I.S.D.* Test Requires School Districts to Engage in Viewpoint Discrimination.

The Fifth Circuit's holding that religious speech under the Santa Fe I.S.D. graduation policy must be nonsectarian and nonproselytizing requires school officials to engage in religious viewpoint discrimination. *See Santa Fe I.S.D.*, 168 F.3d at 833-34 (Jolly, J., dissenting). The majority opinion permits one type of religious speech—ecumenical—to the exclusion of all others. But once ecumenical religious speech is permitted, the state must neutrally accommodate all religious viewpoints. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)); *Widmar v. Vincent*, 454 U.S. 263 (1981).

The Fifth Circuit rejected Santa Fe I.S.D.'s argument that governmental review and approval of only certain kinds of prayer is impermissible viewpoint discrimination, reasoning that the graduation ceremony is not a limited public forum subject to viewpoint discrimination. *Santa Fe I.S.D.*, 168 F.3d at 818-21. Remarkably, the majority admitted that if the graduation program did create a limited public forum, then its proscription of sectarian, proselytizing prayer would constitute unconstitutional viewpoint discrimination. *Id.* at 821.[13] This

[13] The majority concluded: "Thus, if public forum analysis were applicable, then *Clear Creek*'s proscription of prayer that is sectarian and proselytizing would violate the First Amendment after all, but would do so on grounds we never considered in *Clear Creek II*." *Santa Fe I.S.D.*, 168 F.3d at 821 (citing *Jones v. Clear Creek I.S.D.*, 977 F.2d 963 (CA5 1992),

admission is fatal to the Fifth Circuit's logic, however. The Santa Fe I.S.D. graduation policy creates a limited public forum because it places no barriers on speech other than the reasonable time, place, and manner restriction limiting the class of potential speakers to graduating students. *Id.* at 832-33 (Jolly, J., dissenting). Regardless of the type of forum, however, viewpoint discrimination is constitutionally prohibited. *Id.* at 833. Once the state creates a forum of any kind and allows some religious speech, it may not exclude other religious viewpoints. *Id.*

The Court could not be more clear on this subject. "[S]tate regulation of speech should be content-neutral . . . ." *Widmar*, 454 U.S. at 277. But the Fifth Circuit's decision requires just the opposite—*content-based* state regulation of speech. This decision puts the school districts on an unavoidable collision course with the Constitution, and it must be reversed.

C. The Fifth Circuit's Decision Requires School Officials to Become Excessively Entangled in Private Religious Speech.

Instead of enforcing the Establishment Clause, the Fifth Circuit's decision will actually force school districts to violate it. By requiring school officials to preview student messages to determine whether they are overly sectarian or proselytizing, the Fifth Circuit will force school officials to excessively entangle themselves in private religious speech in violation of the Establishment Clause. Not only would review of student prayers by school officials prove unwieldy and unmanageable, it would also cause officials to wade into the constitutional quagmire of editing students' religious speech.

There is no doubt that the Fifth Circuit's content-based

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cert. denied, 508 U.S. 967 (1993)).

restrictions will force school officials to require students to submit their prayers for review prior to school events. The Fifth Circuit acknowledged that its holding would require a school district to review the content of student-initiated, student-led prayers. *Santa Fe I.S.D.*, 168 F.3d at 821 n.12 (citing *Jones v. Clear Creek I.S.D.*, 977 F.2d 963, 967 (CA5 1992)). This new requirement will have perverse and unconstitutional effects, however. Impromptu remarks would have to be discouraged to avoid uncensored speech. Officials must then make the inherently subjective determination of what language in a student's prayer crosses the line. Every determination made by a school official—whether to censor a prayer or to approve it—will subject the school district to potential liability. Rather than face this unpleasant and unconstitutional task, school officials may ultimately prohibit all student speech at school events that could have potential religious overtones.

The Court has repeatedly recognized that government oversight of student-initiated religious speech entangles the state in religion. In *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971), the Court held that a state statute providing aid to church-related elementary and secondary schools excessively entangled church and state because it would require "comprehensive, discriminating, and continuing state surveillance" to meet the requirements of the First Amendment.

> This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches.

Id. at 620.

The Court recognized again in *Widmar v. Vincent*, 454 U.S. 263, 277 (1981), that a university policy that required the content-based exclusion of religious speech violated the fundamental principle that state regulation of speech should be content-neutral. The Court observed that requiring the university and ultimately the courts "to inquire into the significance of words and practices to different religious faiths .... would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.* at 270 n.6.

And in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 845-46 (1995), the Court held that a university policy excluding financial support to a student religious newspaper violated the First Amendment. The Court expressly disapproved the argument that the school was required, "in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question—speech otherwise protected by the Constitution—contain too great a religious content." *Id.* at 844. "[O]fficial censorship would be far more inconsistent with the Establishment Clause," the Court observed. *Id.* at 845.

Requiring school officials to censor student prayers is essentially the same as having an official compose the prayer in the first place. The Court long ago recognized that government "should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Engel v. Vitale*, 370 U.S. 421, 435 (1962). Indeed, "[t]he First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say." *Id.* at 429.

Instead of following this Court's admonitions against state censorship of religious speech, the Fifth Circuit elevated the "nonsectarian," "nonproselytizing" requirement of some school prayer policies to the level of a constitutional mandate. However, this Court has rejected the notion that nonsectarian prayers could resurrect an otherwise unconstitutional government-sanctioned prayer. *See Lee v. Weisman*, 505 U.S. 577, 588-90 (1992); *id.* at 616 (Souter, J., concurring); *Engel*, 370 U.S. at 430.

The Court in *Lee* observed that "though the First Amendment does not allow the government to stifle prayers which aspire to [nonsectarian] ends, neither does it permit the government to undertake that task for itself." 505 U.S. at 589. By forcing school districts to police student speech to stamp out sectarian or proselytizing messages, the Fifth Circuit is requiring officials to undertake a sectarian agenda in violation of the Establishment Clause.

The Fifth Circuit's logic extends beyond student-initiated invocations and benedictions, and ultimately could apply to all speech at school-sponsored events. Will school officials have to preview the contents of a speech any time a speaker could potentially inject a sectarian or proselytizing comment into it? Speakers at graduations, awards ceremonies, speech classes, anti-drug programs, student plays, and football banquets will be potentially subject to the nonsectarian, nonproselytizing requirements imposed by the Fifth Circuit.

A student could give a speech to his class discussing his belief or disbelief in God. A recovering drug addict might testify at a mandatory anti-drug program that he owes his recovery to Jesus Christ. Students could decide to put on a play celebrating religion, such as *Jesus Christ Superstar* or *Godspell*. All of these activities could potentially fall under the ambit of the Fifth Circuit's decision. If school officials do

not censor this speech beforehand, will they have to decide whether to pull the plug on the microphone or use the proverbial cane to pull the offending speaker offstage? Either way, school districts are faced with an unconstitutional Catch-22. This Court should grant certiorari to correct the Fifth Circuit's grievous error.

D. The State Can Advance Other Secular Purposes for a Student-Led Invocation Other than Solemnization.

Deciding that an invocation is only appropriate at "solemn" events, the Fifth Circuit reaches the remarkable conclusion that ceremonial prayer is never appropriate at football games because football games are not solemn.[14] Not only does this holding underestimate the devotion some have to high school football, it mistakenly and unnecessarily limits the category of acceptable secular purposes that can support ceremonial prayer. Solemnization is not the only permissible secular purpose. It is simply "*a* legitimate secular purpose of ceremonial prayer."[15] *Clear Creek*, 977 F.2d at 966 (emphasis added).

As Judge Jolly pointed out in his dissent, there are legitimate secular purposes underlying student-given

[14] "Now we come to the remarkable holding of the majority that, for the most curious reasons, the First Amendment allows speech at graduation ceremonies but bars speech at sporting events. In short, there is a total absence of merit to the contention that the Football Policy might be constitutionally deficient when the graduation policy is not." *Santa Fe I.S.D.*, 168 F.3d at 834 (Jolly, J., dissenting).

[15] Although the majority in *Santa Fe I.S.D.* scoffed at the idea that there could be a secular purpose in having sectarian or proselytizing prayers, *see Santa Fe I.S.D.*, 168 F.3d at 816-17, states have an interest in having a nondiscriminatory policy that does not restrict the content of prayers.

invocations before football games, such as promoting honest and fair play in an otherwise rough and dangerous sport, encouraging clean competition and team work, and striving for individual excellence. *See Santa Fe I.S.D.*, 168 F.3d at 835 (Jolly, J., dissenting). Indeed, these are values that public schools seek to instill in students on a daily basis.

The Fifth Circuit's condemnation of Santa Fe's football policy underscores the majority's basic misunderstanding of prior Supreme Court authority. The content of the speech is not the focus of the Court's inquiry. Instead, it is whether school officials neutrally accommodate all speech in a nondiscriminatory fashion. The first paragraph of the Santa Fe football policy achieves exactly that. The policy does not require a prayer at all, but allows students to determine whether "to deliver a brief invocation and/or message." Petition for Writ of Certiorari at 4, App. F, *Santa Fe I.S.D. v. Doe*, (U.S. July 6, 1999) (No. 99-62). The Fifth Circuit erred here, and this Court should hold that the policy is constitutional.

II. This Case Requires Review to Resolve a Split in the Circuits on this Important Issue.

Since the petition for certiorari was filed in this case, the Eleventh Circuit handed down an opinion that directly conflicts with the Fifth Circuit's decision in *Santa Fe I.S.D.*

In *Chandler v. James*, Nos. 97-6898, 97-6953, 1999 WL 493495 (CA11 July 13, 1999), the Eleventh Circuit considered a district court's permanent injunction prohibiting vocal prayer or other devotional speech in schools. Although the injunction did not prohibit voluntary prayer at school so long as it was purely private, it did prohibit all public prayer or devotional speech by students or other private individuals at school or school-related events, such as in the classroom, at school assemblies, and at sporting events.

The Eleventh Circuit vacated the injunction and held that "genuinely student-initiated religious speech is private speech endorsing religion" and is "fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution." *Id.* at *6. "'Students do not shed their constitutional rights . . . at the schoolhouse gate.'" *Id.* at *6 (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)).

In contrast to the Fifth Circuit, the Eleventh Circuit rejected the argument that the state has a positive duty to censor student speech if it is religious. *Id.* at *5. "The suppression of student-initiated religious speech is neither necessary to, nor does it achieve, constitutional neutrality towards religion. For that reason, the Constitution does not permit its suppression." *Id.* Recognizing that government must be neutral toward religion, the court found that the discriminatory suppression of student-initiated religious speech demonstrates hostility toward religion, not neutrality. *Id.* at *6. The court concluded that permitting students to engage in religious speech signifies neither state approval nor disapproval of that speech. *Id.*[16]

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[16] Interestingly, the parties in *Chandler* did not contest a ruling by the district court that declared unconstitutional an Alabama statute that, like the ruling of the Fifth Circuit in this case, discriminated against student-initiated prayers that are proselytizing and sectarian. *Chandler v. James*, 958 F.Supp. 1550, 1559-62 (M.D. Ala. 1997), *aff'd in part and vacated in part*, Nos. 97-6898, 97-6953, 1999 WL 493495 (CA11 July 13, 1999). The district court concluded: "The Alabama legislature has defined its public school students' free speech and prayer rights too narrowly. To the extent that students' free speech rights attach, they are free to engage in *sectarian, proselytizing* religious speech." *Id.* at 1560 (emphasis in original); *see also Ingebretson v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278 (CA5), *cert. denied*, 519 U.S. 965 (1996) (holding unconstitutional Mississippi statute allowing nonsectarian, nonproselytizing student-initiated prayer at school events and observing that the statute would "inevitably . . . force" the state "to decide who prays and which prayers qualify as nonsectarian and nonproselytizing").

In reaching its decision, the Eleventh Circuit addressed a fundamental question that was glossed over by the Fifth Circuit: who is the state actor? Is it the student? Is the student speech attributable to the state?

Answering these questions in the negative, the Eleventh Circuit correctly noted that the government must remain neutral and play no role in the speech; the fact that the speech is permitted does not run afoul of the First Amendment. Unless the school is using the student as a "surrogate" or is commanding the speech, there is no state action. "Religious speech by students does not become forbidden 'state action' the moment the students walk through the schoolhouse door." *Chandler*, 1999 WL 493495, at *6.

The Fifth Circuit's decision, however, implicitly assumes that students are somehow transformed into state actors.[17] This astonishing conclusion conflicts with this Court's established

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[17] In *Adler v. Duval County School Board*, 174 F.3d 1236, 1251 (CA11 1999), *reh'g en banc granted and opinion vacated*, 1999 WL 354889 (CA11 June 3, 1999), the Eleventh Circuit panel held that a school policy allowing unrestricted student-initiated "messages" at the beginning and end of high school graduation ceremonies violated the Establishment Clause. Unlike the Fifth Circuit, the *Adler* court explicitly relied on its determination that students became state actors because the school delegated one portion of the ceremony to students. *Id.* at 1246-47. The Eleventh Circuit apparently has reconsidered this conclusion and has granted the petition for rehearing and vacated this opinion. Although the Fifth Circuit never says so directly, it apparently reached the same conclusion as the panel in *Adler*, as it revealed in a footnote stating that student-led graduation prayers "do not constitute private speech." *Santa Fe I.S.D.*, 168 F.3d at 821 n.12.

First Amendment precedent, as well as the Eleventh Circuit's decision in *Chandler*.

The issues addressed in these cases touch on some of our most treasured and profound rights. As noted in the petition for certiorari, other circuits have grappled with these issues and will continue to do so. Guidance from the Court is necessary.

CONCLUSION

For these reasons, *amici* respectfully request that the Court grant the petition for writ of certiorari.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas
ANDY TAYLOR
First Assistant Attorney General
LINDA S. EADS
Deputy Attorney General for Litigation
GREGORY S. COLEMAN
Solicitor General
JULIE CARUTHERS PARSLEY
Deputy Solicitor General
Counsel of Record
MEREDITH B. PARENTI
Assistant Solicitor General

P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
(512) 936-1896

COUNSEL FOR *AMICI*

MOTION FILED
AUG 6 1999

(4)

No. 99-62

IN THE
SUPREME COURT OF THE UNITED STATES

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

JANE DOE, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILDREN, JANE AND JOHN DOE, MINOR CHILDREN; JANE DOE #2, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILD, JOHN DOE, MINOR CHILD, AND JOHN DOE, INDIVIDUALLY,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE FOR THE PETITION FOR WRIT OF CERTIORARI

John W. Whitehead
Steven H. Aden (Counsel of Record)
Jennifer R. Schans
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia 22901
(804) 978-3888

August 6, 1999

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Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Rutherford Institute hereby respectfully moves the Court for leave to file the following brief *amicus curiae* in this case. The consent of counsel for the Petitioners has been obtained. The consent of counsel for the Respondents has been requested and refused.

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989) and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over two dozen *amicus curiae* briefs in the United States Supreme Court, including the following cases: *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Davis v. Monroe County*, 119 S. Ct. 29 (1998); *Kolstad v. American Dental Association*, 119 S. Ct. 2118 (1999); *Slack v. McDaniel*, Sup. Ct. No. 98-6322 (October Term 1998) and *State of Wyoming v. Houghton*, 119 S. Ct. 1297 (1999), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred cases nationally, including numerous public school issues involving the Establishment Clause, the Freedom of Speech Clause and the Free Exercise of Religion Clause. The Institute has published educational materials and taught continuing legal education seminars in this area as well.[1]

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[1] John W. Whitehead has published several dozen books and articles on constitutional and civil rights issues. *See, e.g., Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines,* 28 TULSA L. REV. 149 (1992); *The Conservative Supreme Court and the Demise of the Free Exercise Clause,* 7 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997); and *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's 1997-1998 Term*, 71 TEMPLE POL. & CIV. RTS. L. REV. 773 (1998). The Institute also publishes informational pamphlets and briefs

The Rutherford Institute is submitting a brief *amicus curiae* in support of the Petitioners. In light of the important issues being raised in this case, the Institute respectfully requests that its arguments be heard.

Respectfully submitted,

John W. Whitehead
Steven H. Aden (Counsel of Record)
Jennifer R. Schans
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia 22901
(804) 978-3888

August 6, 1999

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addressing employment discrimination and workplace accommodation, free speech, and other civil rights topics.

QUESTIONS PRESENTED FOR REVIEW

I. Does the Establishment Clause require public high schools to exclude religious content from student-initiated speech at a school function where non-religious student speech is permitted, or does such exclusion require viewpoint discrimination in violation of the Fee Speech Clause?

II. The court below held that the Petitioner must regulate the content of student-initiated invocation and benedictions at a high school graduation ceremony by directing students to keep their messages "non-sectarian" and "non-proselytizing."

Does a rule that requires high school officials to regulate student messages to ensure that they are "non-sectarian" and "non-proselytizing" violate First Amendment prohibitions against viewpoint discrimination and the establishment of religion?

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Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF *AMICUS CURIAE*[2]

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[2] We have requested consent from all parties. The Petitioner has consented to the filing of this brief; the Respondent has not. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Security,* 489 U.S. 829 (1989) and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over two dozen *amicus curiae* briefs in the United States Supreme Court, including the following cases: *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Davis v. Monroe County*, 119 S. Ct. 29 (1998); *Kolstad v. American Dental Association*, 119 S. Ct. 2118 (1999); *Slack v. McDaniel*, Sup. Ct. No. 98-6322 (October Term 1998) and *State of Wyoming v. Houghton*, 119 S. Ct. 1297 (1999), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred cases nationally, including numerous public school issues involving the Establishment Clause, the Freedom of Speech Clause and the Free Exercise of Religion Clause. The Institute has published educational materials and taught continuing legal education seminars in this area as well.[3]

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[3] John W. Whitehead has published several dozen books and articles on constitutional and civil rights issues. *See, e.g., Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines,* 28 TULSA L. REV. 149 (1992); *The Conservative Supreme Court and the Demise of the Free Exercise Clause,* 7 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997); and *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's 1997-1998 Term*, 71 TEMPLE POL. & CIV. RTS. L. REV. 773 (1998). The Institute also publishes informational pamphlets and briefs

STATEMENT OF THE CASE

The Court's *amicus* adopts the statement of facts and the statement of the case which the Petitioner, Santa Fe Independent School District provided in the Petition for Writ of Certiorari.

ARGUMENT

The Santa Fe School Board amended its policy concerning invocations and benedictions at graduation ceremonies and football games to allow the students to decide whether or not to accept the platform. Every decision and action relating to the presentation was controlled by students. Although the students' decision was permitted by the school, it was not encouraged or coerced by the school. The panel majority erred, therefore, in concluding that the invocation and benediction were school-sponsored and school-controlled. The court committed similar error in holding that merely because the school subsidized the graduation ceremony and school officials attended the ceremony, the school was constitutionally responsible for the acts and decisions of the students which the school permitted. The court also committed error in holding that a student may only be permitted to engage in a voluntary, student-initiated invocation or benediction where such prayer is "non-sectarian" or "non-proselytizing."

I. THE SANTA FE POLICY DOES NOT CONSTITUTE AN "ESTABLISHMENT OF

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addressing employment discrimination and workplace accommodation, free speech, and other civil rights topics.

RELIGION" IN VIOLATION OF THE FIRST AMENDMENT

A. There Can be No Violation of the Establishment Clause Where the Speech at Issue is Purely Private Speech and Not Government Action

The Establishment Clause limits the power of government to promote or engage in religious activity. Where the impetus for religious activity is purely of private initiative and design, however, there is no state action and the Establishment Clause does not proscribe the conduct. *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). This is true even if there is government assistance so long as the criteria for receiving that assistance is neutral with respect to religion. *See Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998) (no state action leading to endorsement problem where school officials merely permitted private individuals on a viewpoint-neutral basis to place Bibles on school property).

The Santa Fe School Board policy is written in such a way that it grants permission to the students to hold a secret ballot to allow invocations and benedictions at graduation ceremonies and football games, but it in no way requires the students to hold or participate in the voting process. Once the vote does take place, the only other action by the school board is to give the platform over to the students. Therefore, the speech is purely private when given. There is no government action which compels the speech or assists in drafting its content.

B. Assuming *Arguendo* the Establishment Clause is Implicated by the Santa Fe Students' Voluntary Speech, the Policy Passes Constitutional Muster as an Appropriate Accommodation of Student and Community Beliefs

1. There is no "endorsement" involved, as no reasonable observer could perceive a government "endorsement" of religion by the school district where the students directed and controlled the platform.

In *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990), this Court held that a public school does not unconstitutionally endorse religion by permitting a religious club to meet on school grounds and recruit members through the school's newspaper, bulletin boards, public address system, and annual club fair. *Id.* at 247-53.[4] The Court emphasized that:

> there is a "crucial difference" between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.

Id. at 250 (emphasis in original).

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[4] The Court affirmed the constitutionality of the Equal Access Act (20 U.S.C. §§ 4071-4074), which grants religious clubs the same privileges as those of other non-curricular student organizations.

The *Mergens* Court thus acknowledged that secondary school students are mature enough not to attribute official school endorsement to student religious groups merely because the school permits the groups to meet and to enjoy the privilege of disseminating information about their group. *Id. See also Hedges v. Wauconda Community Union Sch. Dist.*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993) ("ignorant bystanders cannot make censorship legitimate. . . . Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether . . . schools can teach anything at all. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons.") The same rationale clearly applies to student-initiated and directed prayer.

This distinction between government action endorsing religion and private religious speech was also critical to the Supreme Court's rationale in *Lee v. Weisman*, 505 U.S. 577 (1992). In *Lee*, the principal of a public school invited a local member of the clergy, a Jewish rabbi, to give "non-sectarian" prayers and provided the rabbi with guidelines as to the content of the prayers. *Id.* at 581. A student, Deborah Weisman, challenged the legality of these prayers on Establishment Clause grounds.

While no particular Establishment Clause approach garnered a majority, the Court's plurality held that when a public school official invites a member of the clergy to deliver a graduation prayer, and when the official advises the member of the clergy on how to deliver that prayer, there is a violation of the Establishment Clause. *Id.* at 597. However, Justice Souter, in a concurring opinion joined by Justices Stevens and O'Connor, wrote:

> If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.

Id. at 606 (Souter, J., concurring). If, as these Justices have suggested, it is permissible for a valedictorian to include a religious message in his or her valediction, it is hard to see how such a unilateral dictate is constitutionally preferable to a similar decision arrived at by a majority vote of all graduating students. It would seem irrelevant, once the school district has delegated that decision to the student body, what process the students undertake to arrive at these decisions.

The Fifth Circuit's decision in *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) was based in part on this same reasoning:

> A graduating high school senior *who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer* will understand that any religious references are the result of student, not government, choice.

Id. at 969 (emphasis in original). Perhaps the court made itself most clear when it said:

> The practical result of our decision, viewed in light of *Lee*, is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies.

Id. at 972.[5] Therefore, it cannot be said that government "endorses" religion by permitting students to express their own beliefs in the invocation and benediction they have been chosen to give.[6]

Recently, In *Chandler v. James*, 1999 U. S. App. LEXIS 15608 (11th Cir. 1999), the United States Court of Appeals for the Eleventh Circuit ruled that the district court could not constitutionally enjoin a school from permitting student-initiated religious speech in its schools. *Id.* at 8. The case concerned an Alabama statute that permitted "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benediction during compulsory or non-compulsory school-related events." *Id.* at 2. These events included student assemblies, sporting events, graduation or commencement ceremonies, and other related student events. *Id.* The Eleventh Circuit found that

> it is not the 'permitting' of religious speech which dooms [unconstitutional school policies under the Establishment Clause], but rather the ***requirement*** that the speech be religious, i.e., invocations, benedictions, or prayers.

Id. at 11 (emphasis added). In *Chandler*, the school did not require the students' speech to be religious. The school was merely permitting its students, if they so desired, to voluntarily engage in non-sectarian, non-proselytizing prayer, action which the school believed was permitted by the First Amendment. *Id.* at 15. Permitting students to speak does not reflect a school's "endorsement" of the speech in a manner that would violate the First Amendment. This was reinforced by the court when it stated,

> [t]he suppression of student-initiated religious speech is neither necessary to, not does it achieve, constitutional neutrality towards religion. For that reason, the Constitution does not permit its suppression.

Id. at 16.

The court further emphasized that endorsement and disapproval of religion are equally unconstitutional:

> "Cleansing" our public schools of all religious expression, however, inevitably results in the "establishment" of disbelief - atheism - as the State's religion. Since the Constitution requires neutrality, it cannot be the case that government may prefer disbelief over religion.

Id. at 18.

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[5] *See also Doe v. Madison Sch. Dist.*, 147 F.3d 832 (9th Cir 1998), vacated on mootness grounds, 1999 U.S. App. LEXIS 5051 (9th Cir., Mar. 19, 1999). *Madison* dealt with a graduation policy that allowed four or more students selected according to class standing to deliver an uncensored presentation that could consist of "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement." *Id.* at 834. The *Madison* decision states that three distinct features save the graduation policy from unconstitutionality: student delivery of presentations, selection of speakers by a neutral and secular criterion (academic standing), and student autonomy over content. *Id.* at 835.

[6] *See also Adler v. Duval County Sch. Bd.*, 112 F.3d 1475 (11th Cir. 1997) *rehearing en banc denied*, 120 F.3d 276 (11th Cir. 1998), *related proceeding*, 174 F.3d 1236 (11th Cir. 1999), *vacated, rehearing en banc granted*, 1999 U.S. App. LEXIS 13190 (11th Cir. 1999).

2. There is no "coercion" involved in the Santa Fe policy.

In *Lee*, Justice Kennedy's plurality opinion emphasized that the crucial factor in determining whether coercion exists in a graduation prayer case is whether state officials have directed the performance of a formal religious exercise. 505 U.S. at 586-590. Justice Kennedy observed:

> [T]he school district's supervision and control of a high school graduation ceremony places public and peer pressure on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.

Id. at 593. In short, Justice Kennedy's plurality opinion in *Lee* turned on four factors. First, the case involved a public school. *Id.* at 581. Second, school officials and teachers were active in planning the graduation ceremony, inviting a person to offer graduation prayers, and advising the clergy member on the content of his prayers. *Id.* Third, a local member of the clergy offered the graduation prayers. *Id.* Fourth, the case involved a graduation ceremony that graduates and their families might have felt an obligation to attend, even though their attendance was not mandatory. *Id.* at 595.

The Fifth Circuit held in *Clear Creek II* that the Supreme Court's concern over "coercion" in *Lee* vanished if school officials merely permitted the graduating class to choose, by a majority vote, to include a student's prayer.[7] The Fifth Circuit recognized that this "passive" policy, unlike the

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[7] *See generally, Clear Creek II*, 977 F.2d 963.

one in *Lee*, did not mandate an invocation, but merely permitted it if the seniors decided to include one. *Id.* at 968. The panel's recent ruling disregarded this controlling authority by holding that the only prayers given by a student which would be acceptable would be "non-sectarian" and "non-proselytizing." *Does v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 815 (5th Cir. 1999), *rehearing and rehearing en banc denied*, 171 F.3d 1013 (5th Cir. 1999).

3. The Santa Fe policy results in "excessive entanglement" from indirect promotion of sectarian activity.

Concerns over "indirect benefit" to sectarian activities was in part the basis for the court's conclusion that the policy violated the Establishment Clause:

> Prayers that schools "merely" permits will still be delivered ... by means of government-owned appliances and equipment, on government-owned property... thereby clearly raising Establishment Clause concerns.

Id. at 817. Nonetheless, the panel's concerns in this regard are unfounded in light of the Supreme Court's modern Establishment Clause jurisprudence. For decades, the United States Supreme Court's sectarian school funding decisions were arguably in conflict. Recently, however, in a line of decisions which includes *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U. S. 1 (1993), and *Agostini v. Felton*, 521 U.S. 203 (1997), the Court has substantially ameliorated that confusion by articulating a rule that aid to sectarian education is permissible as long as the aid is provided under religiously neutral funding criteria. *Witters*, 474 U.S. at 487; *Zobrest*, 509

U.S. at 10; *Agostini*, 521 U.S. at 234-35. This rule, however, is simply an alternative formulation of the state action test. So long as the funding conditions are religiously neutral, and the decision to commit the funds to sectarian education is made by private individuals, not the state, the Establishment Clause is not implicated. *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 487; *Agostini* 521 U.S. at 226.

The issue of student-initiated prayer is highly analogous to that of state funding. In the funding cases, the state provides aid which ultimately may be used for religious purposes. In the instant case, the state is providing a limited forum (*e.g.* a graduation ceremony) which ultimately may be used for religious purposes. The Court in *Agostini* pointed out that the common thread running through the funding cases was that "any money that ultimately went to religious institutions did so 'only as a result of the genuinely independent and private choices of individuals." 521 U.S. at 226. The funding program's neutral eligibility criteria ensured that the religious use of the funds "was a 'result of the private decision of individual parents' and '[could] not be attributed to state decision making.'" *Id.* (citing *Zobrest*, 509 U.S. at 10). In the present case, the decision whether to have prayer, or even whether to vote on having prayer, at a graduation or football game rests entirely with the students. The students must take the initiative and ask for a vote. The school is merely providing a forum under a religiously neutral policy, which is substantially similar to the provision of indirect aid under religiously neutral criteria.

Furthermore, in the funding cases, the Court pointed out that the aid created "no financial incentive for students to undertake sectarian education." *Witters*, 474 U.S. at 488. Likewise, in the instant case, the school's policy creates no

incentive for students to take a vote to pray; it only states what they should do if they want to initiate prayer. In both issues, the key is that the decision to use the funds or the forum in a religious manner is made by private persons, not the state. Thus there is no state action and no Establishment Clause violation.

II. THE SANTA FE POLICY IS A PERMISSIBLE ACCOMMODATION OF THE STUDENTS' RIGHT OF FREE SPEECH

Any student who chooses to recite a prayer on his or her own initiative may assert his right to freedom of speech under the First Amendment.[8] Therefore, it is permissible for a valedictorian to include a religious message in his or her valediction. When the valedictorian (or other student chosen by some secular criteria) includes such a message, then two elements of the *Lee* decision are missing: *first*, no school official is participating in selecting the speaker or the content of the speech; and *second*, the person offering the speech is a student rather than a member of the clergy.

A. Once the Santa Fe Independent School District Gave the Graduation Ceremony Platform to the Graduating Students, The Santa Fe Students Possessed a First Amendment Right to Present the Ceremony

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[8] *See generally, Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Tinker v. Des Moines Indep. Community Sch. Dist.* 393 U.S. 503 (1969); *Mergens*, 496 U.S. at 226; *Engel v. Vitale*, 370 U.S. 421 (1962); *Madison*, 147 F.3d at 832; and *Clear Creek II*, 977 F.2d at 963.

Free of Government Censorship as to the Content.

The panel majority for the Fifth Circuit erred in concluding that the Supreme Court's free speech precedents were inapplicable to this dispute. The court reasoned that the school, by hosting the graduation ceremony and delegating to students virtually complete control over the content of the ceremony, did not create a limited public forum. *Santa Fe*, 168 F.3d at 819. The court concluded that the graduation ceremony was not an open forum because only certain selected individuals addressed the audience. However, under well-settled law, a public forum may be created for use only by a certain class of speakers. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998). The fact that the government has been ordered to discriminate against religious speakers does not defeat the claim that a public forum has been created. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47-48 (1983). [9]

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[9] Even if the First Amendment does not protect students from censorship of their graduation speeches, the school district nonetheless might decline to censor speakers at the graduation ceremony in consideration of First Amendment principles. There is no obligation on school officials to censor student expression to the full extent permitted by the First Amendment.

The converse is not true, however. If the graduation ceremony is an open forum or a limited public forum (or, as explained *infra*, even a non-public forum), then school officials cannot prohibit student-initiated religious expression. This Court has repeatedly held that when public school students engage in religious expression, the Establishment Clause does not prevail over the Free Speech Clause and authorize the suppression of such expression. *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981); *Mergens*, 496 U.S. at 247; *cf. Norwood v. Harrison*, 413 U.S. 455, 469-70

Assuming for purposes of argument that Santa Fe did not create either an open or limited public forum at its high school graduation ceremonies, a rule prohibiting student-initiated religious expression,[10] and only religious expression, would still contravene the Supreme Court's free speech precedents. Even in non-public fora, government is prohibited from regulating expression based on viewpoint.[11] In *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), the Supreme Court unanimously held that a school district violated the Free Speech Clause of the First Amendment by denying a religious group access to public school premises solely because the group intended to use the building to show a film that dealt with an otherwise permissible subject from a religious perspective. The Court held that speech restrictions that target religious expression discriminate

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(1973) (justifying prior decision of Supreme Court upholding government loan of textbooks to sectarian school students against Establishment Clause challenge on the ground that countervailing Free Exercise Clause concerns warranted such a result).

[10] It has been suggested by one commentator that there is a distinction between verbal acts of worship, such as prayer, and religious expression. Comment, *Student-Initiated Religious Expression*, U. CHI. L. REV. 1565, 1583-84 (1994). This distinction was suggested by Justice White in his dissent in *Widmar*, 454 U.S. at 283-84 & n.2 (White, J., dissenting). This Court explicitly rejected that view, labeling it novel, unintelligible, and unprincipled. *Id.* at 269 n.6. Justice White's view articulated in *Widmar* has not resurfaced in any subsequent decisions. Although he was the sole dissenter in *Widmar*, Justice White wrote for a unanimous Court in striking down similar restrictions on religious expression on public school property in *Lamb's Chapel*, 508 U.S. at 384.

[11] *International Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992); *Cornelius*, 473 U.S. at 800, 806 (both cases quoting *Perry*, 460 U.S. at 45).

based not only on subject matter but also impermissibly on viewpoint *Id.* at 393-94; *see also Rosenberger v. Regents of the Univ. of Va.*, 515 U.S. 819 (1995).

The Fifth Circuit's decision also cannot be reconciled with the Supreme Court's decision in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). *Tinker* involved two high school students and one junior high school student who were suspended from school because they refused to remove black arm bands worn to protest the Vietnam War. The Court held that school officials could not restrict student-initiated expressive conduct unless the conduct could be shown to undermine the discipline of the school or collide with the rights of other students to be secure and let alone. *Id.* at 508.

Presumably, teachers at the high school and junior high school in *Tinker* were in a position to exercise far more control over student expression than was exercised by the Santa Fe officials at the graduation ceremony. Classmates of the *Tinker* plaintiffs were no less "captive" than were those who attended the Santa Fe commencement exercises. In *Tinker*, objecting students could (and in fact did) express their disagreement at appropriate times and in appropriate manners, but they were expected to "endure" the message that their peers sought to communicate by wearing the black arm bands. This tolerance for student speech should also apply to religious expression or at Santa Fe's graduation ceremonies and football games.

B. Censorship of the Students' Graduation Ceremony Activities for Religious Content Would Violate the "Excessive Entanglement" Prong of the *Lemon* Test and Constitute Impermissible Governmental Hostility Toward Religion.

The fact that the graduation invocation and benediction may have indirectly advanced religion and were undertaken with a religious motive does not implicate the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). It may be that one purpose of prayer is to advance religion,[12] but the instant case is distinguishable from the prayer presented in *Lee* in that the religious acts and motives of the Santa Fe students were not those of the government.

The Fifth Circuit brushed aside the questions brought to its attention regarding the extent to which the Establishment Clause requires school districts to police graduation speeches to remove objectionable religious references. Must all graduation speeches receive prior review and approval? Can there be no extemporaneous graduation speeches? Is it sufficient for schools simply to announce that religious speech is impermissible? What are school officials required to do if the valedictorian or other graduation speaker defies the prohibition, departs from the approved text, and expresses impermissible religious ideas?[13]

The Supreme Court has repeatedly refused to construe the Establishment Clause to authorize government to censor student-initiated religious expression. *See Lamb's Chapel*, 508 U.S. at 384; *Mergens*, 496 U.S. at 247; *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981). The risk of an Establishment Clause violation is precisely the type of vague and ill-defined fear that

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[12] *Marsh v. Chambers*, 463 U.S. 783 (1983).

[13] *See ACLU Sued Over Graduation Prayer*, PR Newswire (June 8, 1993) (describing one Tennessee high school's graduation ceremony where the students spontaneously recited, *en masse*, *The Lord's Prayer)*.

the *Tinker* Court held insufficient to justify abridgement of students' free speech rights. *Tinker*, 393 U.S. at 513-14.

The same analysis should be applied to the instant case. The Establishment Clause is not abridged so long as no religious criterion is employed in granting access to the forum.[14] But this also is simply an alternative formulation of a state action test. So long as the grant or denial of access to the forum is not based on religious criteria, the decision to use the forum for religious purposes is made by one or more private individuals, not the state.

CONCLUSION

For all the foregoing reasons, this Court's *amicus* respectfully suggests that this Court should vacate the Fifth Circuit Panel's decision and remand the case for further proceedings.

Respectfully submitted,

John W. Whitehead
Steven H. Aden (Counsel of Record)
Jennifer R. Schans
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia 22901
(804) 978-3888

August 6, 1999

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[14] *See Lamb's Chapel*, 508 U.S. 384; *Mergens*, 496 U.S. at 226; *Widmar*, 454 U.S. at 263.

Supreme Court, U.S.
FILED
DEC 23 1999
CLERK

No. 99-62

IN THE

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

vs.

JANE DOE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

JAY ALAN SEKULOW*
The American Center for Law and Justice
Suite 609
1000 Thos. Jefferson St., NW
Washington, D.C. 20007
(202) 337-2273

Counsel for Petitioner

ANTHONY P. GRIFFIN*
Anthony P. Griffin, Inc. Lawyers
1115 Moody
Galveston, Texas 77550
(409) 763-0386

Counsel for Respondents

*Counsel of Record

PETITION FOR CERTIORARI FILED JULY 2, 1999
CERTIORARI GRANTED NOVEMBER 15, 1999

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D. District court's findings of fact and conclusions of law and final judgment (Dec. 13, 1996) (dkt. 66) D1

E. District court's order on summary judgment (June 3, 1996) (dkt. 29) E1

F. Santa Fe Independent School District Pre-Game Ceremony Policy F1

G. Santa Fe Independent School District Graduation Policy G1

RELEVANT DOCKET ENTRIES

I. U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (Galveston)
No. 95-CV-176

Date	No.	Proceedings
4/4/95	1	COMPLAINT filed * * * [Entry date 04/05/95]
		* * *
5/5/95	3	Minute entry: TRO hearing held. Appearances: Anthony Griffin, Lisa Brown, Kelly Frels, Reagan Pratt. Issued Interim rulings from bench. Court to then finalize Interim Order and to set discovery limits and timetable for final case resolution set status conference for 10:00 5/10/95 before Judge Samuel B. Kent Ct Reporter: Kathy Metzger (mb) [Entry date 05/10/95]
	4	INTERIM ORDER addressing important First Amendment issues regarding the extent to which prayer and religious influence are Constitutionally permissible in public schools, entered; Parties notified. (signed by Judge Samuel B. Kent) (mb)
5/10/95	5	Status conference held before Judge Samuel B. Kent Ct Reporter: Kathy Metzger. Appearances: Anthony

Griffin, Lisa Brown, Kelly Frels, Reagan Prat. All formal discovery suspended pending further order of the Court. Parties to exchange informal information and actively pursue settlement. Supplemental status conference set for 8/4/95 at 1:30. (lb) [Entry date 05/12/95]

* * *

5/10/95 6 TRANSCRIPT OF PROCEEDINGS for dates of 5/5/95 before Samuel B. Kent , filed. (Court Rptr: Kathy Metzger) (lb) [Entry date 05/12/95]

5/12/95 11 ANSWER to Complaint by Santa Fe Independent, Richard Ownby, Fritz Barnett, Michael Lopez Sr., Charles Scott, Jan Rothermel, Ruth Krumei, Denise Cowart, Roney McCary, Board of Trustees fo (Added attorney Kelly Frels, Lisa Ann Brown), filed. (mb) [Entry date 05/17/95]

* * *

5/19/95 13 ORDER filed pursuant to instructions of U.S. District Judge Samuel B. Kent, filed. Parties ntfd. Pursuant to the mandate of the U.S. Court of Appeals for the 5th Circuit, entered this date-No. 95-40356, the Court hereby amends its Interim Order of May 10, 1995, only to

the extent of authorizing recognition of and reference to teachers and administrators of the Defts school district.....All other aspects of the Interim Order remain in full force and effect, filed. (mb)

* * *

8/4/95 14 Status conference held before Judge Samuel B. Kent. Ct Reporter: Kathy Metzger. Appearances: Anthony Griffin, Kelly Frels. Parties to submit jt. proposed order within 10 days allowing Jones type prayer before football games. Dft to finalize a unified 1st Amendment religion/expression policy by 10/13/95 addressing all issues with options in content clearly set out. By same date, parties to prepare factual stipulations and/or factual record composed of affidavit. Dft to submit policy with options set out by 11/3/95, the fact record and its brief; by 11/30/95 pltf to file its brief. Court to rule by 12/20/95. Parties encouraged to settle damage claims as expeditiously as possible. Supplemental status conf. set for 11/3/95 at 9:30 a.m. (lb) [Entry date 08/09/95]

* * *

8/15/95	15	MEMORANDUM by Jane NMI Doe, Jane (#2) Doe in opposition to Proposed Order Regarding Prayer at Football Games, filed (lb) [Entry date 08/17/95]
8/16/95	16	INTERIM ORDER pertaining to Prayer at Football Games, entered; Parties notified. (signed by Judge Samuel B. Kent) Ordered that the district's school board may permit students at the district's high school to vote to include a pre-game prayer at varsity home football games and to select a student volunteer to deliver the prayer (mb) [Entry date 08/17/95]
11/3/95	17	Supplemental Status conference held before Judge Samuel B. Kent Ct Reporter: Kathy Metzger. Appearances: Anthony Griffin, Kelly Frels. (lb) [Entry date 11/06/95]
		* * *
2/2/96	18	STIPULATION by Jane NMI Doe, Jane (#2) Doe, Santa Fe Independent, Richard Ownby, Fritz Barnett, Michael Lopez Sr., Charles Scott, Jan Rothermel, Ruth Krumei, Denise Cowart, Roney McCary, Board of Trustees fo, Robert Sarricchio, Gina Kearley, filed. (ltp)

2/16/96	20	MOTION for summary judgment by Santa Fe Independent, Richard Ownby, Fritz Barnett, Michael Lopez Sr., Charles Scott, Jan Rothermel, Ruth Krumei, Denise Cowart, Roney McCary, Board of Trustees fo Kelly Frels for defendant Board of Trustees fo, RECEIVED IN GALVESTON 2/16/96 Motion Docket Date 3/7/96 [20-1] motion, filed. (ltp) [Entry date 02/28/96] [Edit date 02/28/96]
2/20/96	19	AMENDED STIPULATION Of Fact by Jane NMI Doe, Jane (#2) Doe, Santa Fe Independent, Richard Ownby, Fritz Barnett, Michael Lopez Sr., Charles Scott, Jan Rothermel, Ruth Krumei, Cowart, Roney McCary, Board of Trustees fo, filed. (cp) [Entry date 02/26/96]
3/8/96	21	OBJECTION to [20-1] motion for summary judgment by Jane NMI Doe, Jane (#2) Doe, filed. (ltp) [Entry date 03/11/96]
		* * *
4/2/96	22	OBJECTIONS to plaintiffs summary judgment evidence by Santa Fe Independent, filed. (ltp) [Entry date 04/03/96]
		* * *

4/4/96	24	RESPONSE by Santa Fe Independent to pltf's [21-1] objection to dft's motion for summary judgment, filed. (cp)
		* * *
5/10/96	27	Supplemental Status conference held before Judge Samuel B. Kent Ct Reporter: Kathy Metzger. Appearances: Anthony Griffin, Kelly Frels, Lisa Brown. Court to rule on MSJ by 5/31/96. All other matters ruled on as set out in record. (lb) [Entry date 05/16/96]
		* * *
6/3/96	29	ORDER granting [20-1] motion for summary judgment The Court accordingly finds the parties' arguments on this issue merely academic and altogether MOOT, and medical experts may NOT be deposed; set expert witness list and exhibit list due for 7/15/96 NO EXTENSIONS WILL BE GRANTED; A trial is hereby set for a two day period on either 7/18- or 7/19, 1996, or 7/25-26, 1996, subject only to the Courts criminal docket. This trial setting is firm. NO CONTINUANCES WILL BE GRANTED; the parties are ORDERED to bear their own taxable costs and expenses incurred herein to date; the

		parties are also ORDERED to file nothing further on the issues addressed in this order, entered; Parties notified. (signed by Judge Samuel B. Kent) (ltp) [Entry date 06/04/96]
6/28/96	30	MOTION for partial summary judgment by Santa Fe Independent, Richard Ownby, Fritz Barnett, Michael Lopez Sr., Charles Scott, Jan Rothermel, Ruth Krumei, Denise Cowart, Roney McCary, Board of Trustees fo, Motion Docket Date 7/18/96 [30-1] motion, filed. (cp)
		* * *
7/8/96	32	ORDER set trial date 8:30 7/25/96-7/26/96 before Judge Samuel B. Kent, entered; Parties notified. (signed by Judge Samuel B. Kent) (mb)
		* * *
7/12/96	35	ORDER mooting [30-1] motion for partial summary judgment, entered; Parties notified. (signed by Judge Samuel B. Kent) Parties are ordered to bear their own taxable costs and expenses incurred herein to date (mb) [Entry date 07/15/96]
		* * *

7/17/96	37	Pre-trial conference held before Judge Samuel B. Kent Ct Reporter: Kathy Metzger; Appearances: Anthony Griffin, Reagan Pratt, Lisa Brown, all claims dismissed regarding defendant, in his/her official capacity; each side bears own costs; Regarding testimony of minor pltfs, proceedings closed to public, on terms set out in record; all proceeding regarding adult plaintiffs open; all other proceedings except minor plaintiffs testimony open, Pretrial conference to be held during the period of 7/22-24/96; Time and date to be set. (ltp)

* * *

7/24/96	45	Motion hearing held, appearances: Anthony Griffin, Reagan Pratt, re:Pltf's Motion for Reconsideration of Court's Prior Order re:Privacy issues. Motion DENIED. Written Order to follow as soon as possible. Pre-trial conference to proceed after hearing before Magistrate Judge. Case remains set and ready for 8:30 a.m. on July 25, 1996. No continuances will be granted. Ct Reporter: Kathy Metzger (mb)

* * *

7/24/96	53	AGREED ORDER pertaining to trial conduct, entered; Parties notified.

(signed by Magistrate Judge John R. Froeschner) (mb) [Entry date 07/29/96]

* * *

7/25/96	48	TRANSCRIPT OF PROCEEDINGS of Hearing for dates of 7/17/96 before Judge Samuel B. Kent, filed. (Court Rptr: Kathy L. Metzger) (ltp)
7/26/96	52	Bench trial held before Judge Samuel B. Kent. Appearances: Anthony Griffin, Reagan Pratt, Kelly Frels, Lisa Ann Brown. Non-jury trial on damages completed on July 26, 1996. Pltfs' to submit Findings of Fact, Conclusions of Law, Trial Briefs and Proposed Judgment as well as Application for Attorney Fees and supporting affidavits by 1996. Disc. to be allowed between September 2-30, 1996 re: attorneys fees only. Deft to submit proposed Findings of Fact and Conclusions of Law, Trial Briefs and Proposed Judgment with Response to Application for Attorneys Fees by October 25, 1996. Pltf file Reply Brief limited to 5 pages and Reply to Response to Application for attorneys Fees by November 1, 1996. ANY PLEADING NOT FILED IN STRICT COMPLIANCE WITH THESE DEADLINES WILL BE STRICKEN! ANY DISCOVERY DISPUTES WILL BE RESOLVED IN

HEARING WITH NO PLEADINGS. Court to rule on all issues by November 22, 1996, docket obligations permitting. Ct Reporter: Kathy Metzger (mb)

* * *

8/30/96	56	TRIAL BRIEF by Jane Doe and Jane (#2) Doe, filed (nd) [Entry date 09/03/96]

* * *

8/30/96	58	Proposed FINDINGS OF FACT AND CONCLUSION OF LAW by Jane Doe and Jane (#2) Doe, filed. (nd) [Entry date 09/04/96]

* * *

10/25/96	60	TRIAL BRIEF by Santa Fe Independent School District, filed (cp)
10/25/96	61	Proposed FINDINGS OF FACT AND CONCLUSION OF LAW by Santa Fe Independent, filed. (cp)

* * *

12/13/96	64	FINDINGS OF FACT AND CONCLUSIONS OF LAW, entered (signed Judge Samuel B. Kent) (mb)

* * *

12/13/96	66	FINAL JUDGMENT, ORDERED that Pltfs take nothing from Deft; are awarded no attorney's fees; each party shall bear its own taxable costs and expenses incurred to date, entered. Parties ntfd. (signed by Judge Samuel B. Kent) (mb)

* * *

1/13/97	67	NOTICE OF APPEAL of [66-1] order, [29-2] order, [16-1] order, [4-1] order by Santa Fe Independent, filed. * * * Appeal record due on 1/28/97 (ltp) [Entry date 01/14/97]
1/13/97	68	CROSS NOTICE OF APPEAL of [66-1] order, [65-1] order, [29-2] order, [16-1] order, [4-1] order by Jane (#2) Doe, Jane NMI Doe, filed. * * * Appeal record due on 1/28/97 (ltp) [Entry date 01/14/97] [Edit date 01/14/97]

* * *

4/9/97	71	VOLUME I TRANSCRIPT OF PROCEEDINGS of bench trial for dates of 7/25/96 before Judge Samuel B. Kent , filed. (Court Rptr: Kathy Metzger) (ltp)
4/9/97	72	VOLUME II TRANSCRIPT OF PROCEEDINGS of bench trial for dates of 7/26/96 before Judge Samuel

		B. Kent, filed. (Court Rptr: Kathy Metzger) (ltp)
4/9/97	73	TRANSCRIPT OF PROCEEDINGS of supp status conf for dates of 5/10/96 before Judge Samuel B. Kent , filed. (Court Rptr: Kathy Metzger) (ltp)
4/9/97	74	TRANSCRIPT OF PROCEEDINGS of for dates of 11/3/95 before Judge Samuel B. Kent , filed. (Court Rptr: Kathy Metzger) (ltp)
4/9/97	75	TRANSCRIPT OF PROCEEDINGS of supplemental for dates of 8/4/95 before Judge Samuel B. Kent, filed. (Court Rptr: Kathy Metzger) (ltp)
5/5/97	76	TRANSCRIPT OF PROCEEDINGS of for dates of 5/5/95 before Judge Samuel B. Kent , filed. (Court Rptr: Kathy Metzger) (ltp) [Entry date 05/15/97]
		* * *

II. U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT
Nos. 97-40150, 40151

* * *

5/21/97	Briefing notice issued. * * *

* * *

11/25/97	Briefing Complete. * * *

* * *

3/3/98	Oral argument heard. Case argued by Lisa A Brown for Appellant-Cross-Appellee Santa Fe Indep Sch in 97-40150, Debora L Perkey for Appellee-Cross-Appellant Jane Doe #2, Appellee-Cross-Appellant Jane Doe in 97-40150, Lisa A Brown for Appellant-Cross-Appellee Santa Fe Indep Sch in 97-40151, Debora L Perkey for Appellee-Cross-Appellant Jane #2, Appellee-Cross-Appellant Jane Doe in 97-40151 [97-40150, 97-40151] [97-40150 97-40151]

* * *

2/26/99	Opinion filed. * * *
2/26/99	Judgment entered and filed. [97-40150, 97-40151] [97-40150 97-40151]

* * *

3/9/99	Extension granted by phone until: 3/19/99 to file rehearing for Appellant-Cross-Appellee Santa Fe Indep Sch in 97-40150, Appellant-Cross-Appellee Santa Fe Indep Sch in 97-40151. [97-40150, 97-40151] [97-40150 97-40151]

* * *

3/19/99	Petition filed by Appellant-Cross-Appellee Santa Fe Indep Sch in 97-40150, Appellant-Cross-Appellee Santa Fe Indep Sch in 97-40151 for rehearing en banc. * * *
	* * *
4/7/99	COURT Order filed denying appellant's petition for rehearing en banc. * * * (EGJ, with whom PEH, EHJ, JES, RHB, EMG, and HRD, join, dissenting) Copies to all counsel. [97-40150, 97-40151] [97-40150

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILDREN, JANE AND JOHN DOE, MINOR CHILDREN

AND

JANE DOE, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILD, JOHN DOE, MINOR CHILD AND JOHN DOE, INDIVIDUALLY,
PLAINTIFFS,

CIVIL ACTION NO. G-95-176
CIVIL RIGHTS/ FIRST AMENDMENT

SANTA FE INDEPENDENT SCHOOL DISTRICT, RICHARD OWNBY, Superintendent, FRITZ BARNETT, MICHAEL LOPEZ, SR., CHARLES SCOTT, JAN ROTHERMEL, RUTH KRUMEI, DENISE COWART and RONEY MCCARY, as the BOARD OF TRUSTEES for the SANTA FE INDEPENDENT SCHOOL DISTRICT and their successors in office in their official capacities,
DEFENDANTS.

PLAINTIFFS', JANE DOES', ORIGINAL COMPLAINT
[Filed Apr. 4, 1995]

This lawsuit is brought by two parents with children attending schools in the Santa Fe Independent School District and a student attending the Santa Fe High School against the Defendants, Santa Fe Independent School District, its Superintendent of Schools, and the Board of Trustees of the School District who presently sit and any thereafter appointed, elected or assigned during the pendency of these proceedings. This lawsuit is brought to address certain constitutional violations of the First Amendment of the United States Constitution, to request certain injunctive and declaratory relief and for any equitable relief that the Plaintiffs may be entitled to under law. The Plaintiffs would show unto the Court as follows:

Parties

1) The parties have brought this suit as pseudonyms in light of the emotional nature of the debate that surrounds any attempt to remind administrators, school trustees and/or persons in authority of the value of the separation of church and state and the need to prevent the government from endorsing one religion over another.

2) Each Plaintiff is a parent of students in the Sante Fe School District. Both parents have two children in the District. Plaintiff JOHN DOE is of the age of eighteen (18) years of age and is a student in the District.

3) The SANTA FE INDEPENDENT SCHOOL DISTRICT is a political subdivision of the State of Texas,

authorized and chartered under Texas law to educate children within the confines of its district.

4) FRITZ BARNETT, MICHAEL LOPEZ, JR., CHARLES SCOTT, JAN ROTHERMEL, RUTH KRUMEI, DENISE COWART and RONEY MC CARY are Board of Trustees for the Santa Fe School District and represent those persons responsible for implementing policy at the Santa Fe Independent School District.

5) RICHARD OWNBY is the Superintendent for the Santa Fe Independent School District.

Jurisdiction and Venue

6) This Court has original jurisdiction pursuant to 28 U.S.C. section 1331 in that the Plaintiffs' cause of action arises under the Constitution and laws of the United States.

7) Jurisdiction and venue also vest pursuant to 28 U.S.C. section 1391 (b) in that all Defendants reside in the district and the Plaintiffs' claim arose in said district.

8) This Court has jurisdiction in light of the First Amendment of the United States Constitution being violated.

Allegations and Facts that Form
the Basis of This Suit

"Gideon Bible"

9) The Defendants have instituted certain policies and practices that are violative of the First Amendment of the United States. One such practice is the distribution of Gideon Bibles. This practice has been undertaken at least since 1993, and entails an invitation to the Gideons to

distribute bibles to students at the Junior High and High Schools. Even though the board has a policy against the distribution of bibles, the practice continues with the Defendants' knowledge, explicit invitation and unwritten policy.

10) Gideon bibles were distributed in December of 1993 at the Intermediate school. The distribution was approved by the Principal, Roy Johnson.

11) On or about April 14, 1994, Gideon Bibles were distributed at the High School and thrust upon each student who exited the High School. The Gideons were invited to the school by school officials and/or the appearance was approved by the officials in question. The Superintendent of Schools, Richard Ownby's, approval was based upon a feeling that the continuation of the distribution policy would be less controversial than to stop the practice. The practice is not a secret in the District; by way of example, an attachment under Appendix A is a copy of a document distributed at a local church. The document reveals the policy and practice of the District. The attachment is also provided in light of the Plaintiffs' request for injunctive relief herein. Plaintiffs also submit under Appendix B, a document from Roy E. Johnson updating the Superintendent as to the activities at the Intermediate School in general, and the Gideon Bible distribution in particular.

Graduation Ceremonies, Prayer in School,
Inquiry as to Religious Beliefs

Commencement Exercises

12) The practical effect of the unwritten and everyday practices in the Sante Fe Independent School District are in violation of the First Amendment rights of students in the district and/or the governmental endorsement of one religious belief over another. The commencement exercise of May 27, 1994 is exemplary:

Invocation: Teri Edson, Senior Class President.

"Please bow your heads."

"Dear heavenly Father, thank you for allowing us to gather here safely tonight. We thank you for the wonderful year you have allowed us to spend together as students of Santa Fe. We thank you for our teachers who have devoted many hours to each of us. Thank you, Lord, for our parents and may each one receive the special blessing. We pray also for a blessing and guidance as each student moves forward in the future. Lord, bless this ceremony and give us all a safe journey home. In Jesus' name we pray."

Salutatory address: Brittany Lindsey.

. . . "There is only one thing which we as Christians can truly rely, the faithfulness and strength of a loving God. It is now that each of us must stand on a solid rock of

Jesus Christ, stand up for those things on which we believe. Even if it is alone that we must stand. We, having done all, must continue to stand in faith remembering that Christ would have suffered and died for only one of us. So we begin the journey of life, not a life of mediocrity and compromise, but the possible life which Christ has promised, a life of abundance and joy, being confident of this very thing, that he who has begun a good work in you will complete it until the day of Jesus Christ. Thank you."

Benediction: Christy Rice, Senior Class Secretary.

"Our most gracious heavenly Father, we thank you for bringing us to this, our graduation. We ask you to be with us as we start a new beginning to our lives. Father, we express our gratitude to all that have helped us over the past three years especially we thank our parents, teachers, and friends who encouraged us, counseled us, and always extended a helping hand when needed. Please see us safely through this night and the tomorrows of our lives. In Jesus' name Amen."

13) During assemblies, graduation ceremonies and/or commencement exercises, the speeches and/or presentations of students are approved by the administrators of the District. In fact, if a student strays, deviates and/or contextually changes the text, substance of a speech or presentation, the administration has the power to mute the microphone and/or remove the student from the podium. The School District's further acknowledgment is shown by the inclusion of apicture of the bible on the commencement program.

The Classroom

14) On April 5, 1993, Jane Doe arrived at Santa Fe Junior High to pick up her daughter - a twelve year old. When Jane Doe's daughter entered the car, she began to recount an incident that occurred in the Texas History class. Plaintiff's Doe's daughter explained that fliers were handed out announcing a coming revival to be held at Jack Brooks Park. The fliers were handed out by teacher David Wilson. During the course of disseminating the fliers, the teacher asked one of the students whether she planned on attending. The student responded, yes. Mr. Wilson then said, "You know, you can invite a friend." The student then responded by saying that she would invite Jane Doe's daughter and in turn, handed a flier to her. Jane Doe's daughter then responded that she didn't know if she could go and asked if anyone could go or was it just for Baptists. The student handing the flier then inquired as to her religious beliefs. Jane Doe's daughter then responded that she was a Mormon. The teacher stated, "Oh, that's a cult." Plaintiff's daughter responded, "What?" and the teacher repeated, "That's a cult. Would you like to know about the Mormons?" The teacher then began to explain that the Mormons were not Christians, that they use the "Mormon Bible" and practiced polygamy.

The discussion took place for ten to fifteen minutes of class. The discussion took place during the time of the Branch Davidian crisis in Waco, Texas and therefore, a great deal of publicity with respect to cults was being discussed by students, parents and society in general. After the teacher's remarks during the remaining period of the class, other students directed comments to Plaintiff Doe's daughter:

"He sure does make it sound evil!"

. . . "Gee, it's kind of like the KKK, isn't it?"

. . . "I don't know if I should hang around you anymore!"

15) On May 2, 1994, Jane Doe's son, then a third grader at Santa Fe Elementary School, brought home a permission slip. The teacher, at the time, was Theresa Locke. The permission slip sought permission to teach a religious song in sign language during class. Parents were to mark the document yes or no, sign and send it back to class with the student. A copy of the document tendered with the song is attached under Appendix C, herein. After receiving the slip/note, the Plaintiff felt that she needed additional information in order to be able to sign and/or send the slip back with her child. The next morning, May 3rd, before leaving for school the child asked for the slip. The Plaintiff informed her child that she was not ready to send it back and wanted to call the school before she signed it. Plaintiff's child then informed her that if she didn't sign it, he would get two discipline marks on the board and would not be allowed to have recess. The Plaintiff then asked her son whether he wanted to learn the song - he responded that he did not. Plaintiff marked the slip 'no', signed it and gave it to her son for his teacher.

16) On May 5, 1995, Plaintiff's son informed her that the teacher had taught the song that morning during Social Studies. Plaintiff's son and a child (a new student who spoke little English) were sent to stand outside the classroom until the class was finished learning the song. The classroom is outside in a temporary building, and the door faces the parking lot. The children were without adult supervision.

17) On May 6, 1995, Plaintiff's son informed her that the class worked on the song again. He was again told to wait outside the class until they were through. The other child

was not present, in that she was in special tutoring. The State's endorsement of religion as explained in paragraphs 14, 15, and herein is exactly what the dictates of the First Amendment have historically taught against. At the time of the second incident, the Plaintiff's primary concern was to assure the safety of her minor child, in that again the child was made to wait outside, unattended, for ten to fifteen minutes. Plaintiff complained to the Assistant Principal, the Principal of the school, and to the Superintendent of Schools. Plaintiff was told that a meeting would be called to deal with establishing a policy as related to religious materials in the classroom. The meeting was called and cancelled.

18) On May 16, 1994, the teacher announced to the class that the "sign song" would no longer be done. The teacher looked directly at Jane Doe's son when making the announcement.

19) On August 16, 1994, a note was forwarded by a classroom teacher to the parents. The note is attached under Appendix B and reflects the policy of the school district as it relates to religion in the school and the insistence that the programs be Christian-based (meaning, to the exclusion of others). The note was forwarded by a Beverly Clayton and part of the note reads, "Periodically, I will be sending home a helpful hint I found useful in raising my own children. I hope you will find them useful too. A recent national poll on factors contributing to happiness and high marks in school included these findings: Students with strong religious background are the most likely to succeed in school. A related factor is that the most successful students were also those most likely to eat dinner regularly with the whole family."

20) The same teacher also distributed the Johnny Appleseed song:

> "Oh the Lord is good to me. And so I thank the Lord, for giving me the things I need, the sun and the rain and the appleseed. The Lord is good to me. Amen, Amen, Amen, Amen, Amen. Dig in!"

21) In November of 1993, fliers were distributed to the student body at the high school requesting "serious students" to participate in the "Joy Club." The club met during Advisory period with Mrs. Newberry as the sponsor. The Joy Club is a religious based club.

22) On November 22, 1993, the district showed edited versions of "America" at the Junior High and High Schools. Signed parental permissions were required before a student was allowed to attend. Unedited versions of the same film were shown at 7:00 o'clock p.m. at the High School Gym.

23) On May 22, 1994, Baccalaureate services were held at the Santa Fe High School Gym. Dick Shotwell, Youth Minister of the First Baptist Church, conducted the services. The selection of Shotwell was at the behest of the Administration without any vote or input from the students.

24) Before every football game, Jane Doe's daughter (a cheerleader) remembers that a prayer proceeded each football game.

25) The activities of the Defendants as set forth herein have no nonreligious purpose. Alternatively, any alleged nonreligious purpose is being advanced by the Defendants by religious means.

26) The activities of the Defendants as set forth herein have the primary effect of advancing, sponsoring, promoting,

endorsing and/or encouraging religion and foster excessive entanglement by Santa Fe Independent School District with religion.

PRAYER FOR RELIEF

27) Defendants have failed to respond to the Plaintiffs' request that they review these practices and communicate a policy correctly, banning and/or modifying the constitutionally violative behavior. The above and foregoing demonstrate that the Defendants, acting under color of state law, have subjected the Plaintiffs to the deprivation of their rights and privileges secured by the First Amendment of the Constitution of the United States entitling the Plaintiffs to redress their injuries under Section 1983 of Title 42 of the United States Code.

28) Plaintiffs are entitled, under and by virtue of the First and Fourteenth Amendments to the Constitution of the United States, 28 U.S.C. section 1983 and Rule 65 of the Federal Rules of Civil Procedure, to a Temporary Restraining Order and Preliminary Injunction enjoining the Defendants from sponsoring, authorizing, supervising, permitting, conducting, supporting or condoning the religious acts, customs, policies, and practices set forth herein.

29) Plaintiffs also feel that they are entitled to injunctive relief protecting them from retaliation by virtue of the Plaintiffs bringing this action seeking to protect their constitutional rights herein.

30) Plaintiffs request a hearing on the issues in this matter, that after any such hearing/trial, the Defendants be enjoined from any future acts violating the First Amendment

of the United States Constitution and that any such injunction contain language of the importance with respect to the dangers of a governmental entity endorsing one religion over another. Plaintiffs request attorneys' fees, costs and all other relief that they may be entitled to.

31) Plaintiffs request monetary damages for the constitutional violations herein.

DATE: 04/04/95

Respectfully submitted,

ANTHONY P. GRIFFIN
ATTORNEY-IN-CHARGE

STATE BAR NO. 08455300
FEDERAL ADMISSIONS NO. 4736

ANTHONY P. GRIFFIN, INC.
1115 MOODY
GALVESTON, TEXAS 77550
409/763-0386
FACSIMILE NO. 409/763-4102

DEBORAH GILMAN
ACLU OF TEXAS LEGAL
COUNSEL
ACLU FOUNDATION OF TEXAS
3400 MONTROSE
HOUSTON, TEXAS 77006
713/942-8966
FACSIMILE NO. 713/942-0131

ATTORNEYS FOR THE
PLAINTIFFS, JANE DOES AND
THEIR MINOR CHILDREN AND
JOHN DOE, INDIVIDUALLY

Doe v. Santa Fe Independent School District:

INTERIM ORDER

[U.S. District Court, S.D. Tex., May 10, 1995]

This case addresses important First Amendment issues regarding the extent to which prayer and religious influence are Constitutionally permissible in public schools. The purpose of this Interim Order is not a comprehensive resolution of those fundamental issues. It is simply to provide some certainty of immediate action for the benefit of the parties, particularly as regards Commencement and related activities, which are now shortly scheduled in the Defendant School District. The Plaintiffs have requested a T.R.O. and F.R.C.P. Rule 65 injunctive relief. But, after carefully considering the pleadings and relevant case authority, and after having conducted two extensive hearings and having conferred extensively with counsel in chambers, the Court feels the better course, in the short term, is to fashion a basis for ultimate relief which will maximize Constitutionally permissible religious expression to the vast majority of Santa Fe citizens, while at the same time halting manifestly impermissible practices which legitimately aggrieve the few.

While the parties retain full right of timely appeal of this and any further Orders of the Court, the courtesy, cooperation and professionalism of the parties and their fine counsel in providing the Court advice and input in the crafting of this Order is genuinely appreciated. If principle is the cornerstone of Constitutional freedom, and cooperation provides the bedrock of democracy, this product of the collective wisdom and beliefs of those involved in this case represents a fine example of what this great, but contentious nation is still capable of creating.

The First Amendment of the United States Constitution provides: "Congress shall make no laws respecting an establishment of religion. . . ." The Amendment requires "the State to be a neutral [party] in its relations with groups of religious believers and non-believers; it does not require the State to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." Everson v. Board of Education, 330 U.S. 1 (1946).

In Lemon v. Kurtzman, 403 U.S. 602, 614, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the United States Supreme Court has recognized that "total separation of the [Church and State] is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."

In Lemon, the Supreme court established a-three-prong test for determining whether governmental activity constituted an establishment of religion in violation of the First Amendment. Under the Lemon test, the governmental practice must: (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. In the present case, the initial issue before the Court is whether an invocation and benediction at a commencement exercise violates the First Amendment. In considering the Constitutionality of permitting an invocation and/or benediction at the commencement exercises, the Court must apply the three-prong test set forth in Lemon.

First, the Court must determine whether having an invocation and/or benediction at the graduation ceremony will further a secular purpose. While the Court is ordinarily deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham. Edwards v. Aquillard, 482 U.S. 578, 586-87 (1987).

In the present case, the Court notes that having an invocation and/or benediction at a graduation ceremony has been held to have the secular purpose of solemnizing the ceremony. Jones v. Clear Creek Independent School District 977 F.2d 963 (5th Cir. 1992); County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

Second, it has been held that the primary effect of a prayer at a graduation ceremony is to solemnize the ceremony and not to advance religion. A requirement that any invocation be nonsectarian and non-proselytizing minimizes the advancement of religion. Jones, 977 F.2d 963, at 967. (Emphasis added.) Thus, under explicit Fifth Circuit mandate, which absolutely binds this Court, any invocation or benediction permitted must be nonsectarian and non-proselytizing.

Finally, this Court must ascertain whether Defendant Santa Fe Independent School District's permitting an invocation and/or benediction would in any way result in an excessive entanglement with religion. The United States Supreme Court in Lee V. Weisman, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), found that unconstitutional coercion occurs when: (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors. Specifically, school officials decided that there would be a prayer at the graduation ceremony, selected the clergyman to give the prayer, and dictated the content of the prayer by presenting to the clergyman a pamphlet setting forth guidelines for "nonsectarian" prayer at school graduations. However, in Jones v. Clear Creek, 977 F.2d 963 (5th Cir. 1992), the Fifth Circuit has found that where the decision to include a prayer at the graduation ceremony was made by the students, a student volunteer was selected by the students to deliver the prayer, and

the content of the prayer was not dictated by the school board or administration, such prayer did not result in an excessive entanglement with religion.

Having an invocation and/or benediction at the commencement exercise serves the secular purpose of solemnizing the occasion. A nonsectarian and non-proselytizing invocation and/or benediction at the graduation ceremony neither advances nor inhibits religion. Permitting a member of the graduating senior class who has been elected by secret ballot to deliver a non-denominational prayer will not result in an excessive entanglement with religion.

Therefore, expressly bearing in mind that this Order is of an interim nature only, and intended to resolve only immediately pending problems, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** as follows:

1. Unless the District's School Board votes promptly to eliminate all prayer, non-denominational prayer will be allowed at the pending graduation of the Santa Fe Independent School District, on or about May 27, 1995, consisting of an invocation and/or benediction. Either or both prayers will be presented by a senior student or students to be selected by the presently enrolled graduating seniors, by secret ballot. Jones, 977 F.2d 963. The mechanics of the election process will be set up by the officers of the graduating senior class. The election may be held on campus but not during normal business hours. No "campaigning" will be allowed on school property. Neither the District nor the school administration will have any substantive input into this process whatsoever. A school administrator will be allowed to be present for the actual election, to maintain order, and to provide for the reasonable safety and security of the proceedings. The

results of the secret election will not be subject to any approval by the District or the School Administration, but the results of the election will be promptly reported by the Senior Class President to the Principal of Santa Fe High School, who shall in turn promptly report the results to the District. Thereafter, the elected student or students will prepare such invocation and/or benediction as that student or those students consider appropriate. Such will not be subject to scrutiny or pre-approval by the District or the School Administration. Jones, 977 F.2d at 969. Generic prayers to the "Almighty", or to "God", or to "Our Heavenly Father (or Mother)", or the like, will of course be permitted. Reference to any particular deity, by name, such as Mohammed, Jesus, Buddha, or the like, will likewise be permitted, as long as the general thrust of the prayer is non-proselytizing, as required by Jones.

Pursuant to further Order of the Court, the School District will be required to establish or to clarify existing policies to deal with either banning all prayer, or firmly establishing reasonable guidelines to allow nonsectarian and non-proselytizing prayer at all relevant school functions.

2. The Court will permit a baccalaureate ceremony presently sponsored by the Santa Fe Ministerial Alliance on or about May 21, 1995. However, such ceremony will not occur during normal school hours. Lamb's Chapel v. Center Moriches Union Free School District, ___ U.S.___, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993)(holding that allowing church access to school premises to exhibit, for public viewing and for assertedly religious purposes, a film dealing with family and child rearing issues would not have been an establishment of religion, where the showing would

not have been during school hours, would not have been sponsored by the school, and would have been open to the public). The ceremony will not be endorsed, sanctioned by, or participated in by any District officials or school administration personnel of any kind or description, including counselors, teachers, school board members, school administrators, or anyone else associated with the school district or the schools in any official or employment context whatsoever, or anyone acting for or on behalf of any of them.

Any and all such persons are certainly entitled to attend such ceremony, but as regular guests only. Such individuals will not be seated in any "place of honor", or in any highly conspicuous position, such as tables in the front, the front row, or the like. District and school officials and/or administrators and the like will not be recognized by name or title during such ceremony, and will not be a functioning part of the ceremony, whatsoever. ANY BREACHES OF ANY ASPECT OF THIS ORDER MAY BE DEALT WITH BY MEANS OF APPROPRIATE SANCTIONS. Attendance of students and guests will be strictly voluntary, and will not in any way be encouraged or mandated by District or school personnel, or by students during normal school hours or on any school property. Jones, 977 F.2d 963.

While these provisions will suffice for this year's baccalaureate service, the Court will subsequently Order the School District to establish a firm policy with regard to baccalaureate activities, which allows either no services, or any baccalaureate service for any reasonable purpose, and refrains from any endorsement or official recognition of the

legitimacy of any service, by the District or school administration.

3. As regards the handing out of Gideon's Bibles, or any other First Amendment materials, hereafter, and pursuant to further Order of the Court, the School District will be required to select and implement a First Amendment dissemination policy. Specifically, the School District will be required to either allow the safe and responsible handing out by non-students of any First Amendment materials on school grounds, in an officially passive context, or to allow no non-student distribution thereof on school property. Gay Student Services v. Texas A & M University, 737 F.2d 1317 (5th Cir. 1984).

4. Pursuant to further Orders of the Court, the School District will be required to establish or to clarify existing policies with regard to dealing with manifest First Amendment infractions of teachers, counsellors, or other District or school officials or personnel, such as ridiculing, berating or holding up for inappropriate scrutiny or examination the beliefs of any individual students. Similarly, the School District will establish or clarify existing procedures for excluding overt or covert sectarian and proselytizing religious teaching, such as the use of blatantly denominational religious terms in spelling lessons, denominational religious songs and poems in English or choir classes, denominational religious stories and parables in grammar lessons and the like, while at the same time allowing for frank and open discussion of moral, religious, and societal views and beliefs, which are non-denominational and non-judgmental.

In addition to the foregoing, it is further expressly **ORDERED**, **ADJUDGED** and **DECREED** that any further

attempt on the part of District or school administration, officials, counsellors, teachers, employees or servants of the School District, parents, students or anyone else, overtly or covertly to ferret out the identities of the Plaintiffs in this cause, by means of bogus petitions, questionnaires, individual interrogation, or downright "snooping", will cease immediately. ANYONE TAKING ANY ACTION ON SCHOOL PROPERTY, DURING SCHOOL HOURS, OR WITH SCHOOL RESOURCES OR APPROVAL FOR PURPOSES OF ATTEMPTING TO ELICIT THE NAMES OR IDENTITIES OF THE PLAINTIFFS IN THIS CAUSE OF ACTION, BY OR ON BEHALF OF ANY OF THESE INDIVIDUALS, WILL FACE THE HARSHEST POSSIBLE CONTEMPT SANCTIONS FROM THIS COURT, AND MAY ADDITIONALLY FACE CRIMINAL LIABILITY. The Court wants these proceedings addressed on their merits, and not on the basis of intimidation or harassment of the participants on either side. By separate Order, the Court will promptly establish the mechanics of and time-table for the timely and effective resolution of this entire case.

IT IS SO ORDERED.

DONE at Galveston, Texas, this the 10th day of May, 1995.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

Doe v. Santa Fe Independent School District:

DEFENDANTS' ORIGINAL ANSWER

[Filed May 12, 1995 in U.S. District Court, S.D. Tex.]

The Defendants file this Answer to Plaintiffs' Original Complaint, as follows:

I.

AFFIRMATIVE DEFENSES

1. Some or all of the Plaintiffs' claims are barred by the applicable statute of limitations.

2. The Plaintiffs lack standing to assert the rights of any third parties.

3. To the extent that any of the individual Defendants are sued in their individual capacities, the individual Defendants assert that qualified immunity bars the claims against them.

II.

SPECIFIC ADMISSIONS AND DENIALS

The Defendants respond to the original complaint on a paragraph-by-paragraph basis as follows:

1. This paragraph does not require a response.

2. The Defendants are without sufficient information either to admit or deny these statements.

3. The Defendants admit the allegation.

4. The Defendants admit that Fritz Barnett, Michael Lopez, Charles Scott, Jan Rothermel, Ruth Krumei, Denise Cowart, and Roney McCrary were members of the Board of Trustees at the time of the filing of this answer. The Defendants admit that the Board of Trustees as a whole is the

District's policymaker; the Defendants deny that any individual Board member is a policymaker.

5. The Defendants admit that Richard Ownby is the superintendent of Santa Fe Independent School District.

6. The Defendants admit that this Court has jurisdiction over federal claims.

7. The Defendants admit that venue is proper.

8. The Defendants admit that the Court has jurisdiction over First Amendment claims; the Defendants deny that they Plaintiffs have stated a claim.

9. The Defendants admit that Bibles were made available by the Gideons, but the Defendants deny that the Gideons were "invited" or endorsed by the Defendants. The remaining allegations are denied.

10. The Defendants admit that Bibles were made available at the intermediate school and that the principal was aware that Bibles would be made available.

11. The Defendants admit that Bibles were made available at the high school in 1994. The Defendants deny the remaining allegations in this paragraph.

12. The Defendants admit that the excerpts ftom the student speeches and prayers are essentially correct. The remaining allegations of this paragraph are denied.

13. The Defendants admit that student "speeches and/or presentations" are reviewed by school officials and that school officials have the power to mute the microphone during a speech; the Defendants, however, deny that the review process or the ability to mute the microphone constitutes approval or disapproval of the content of any given speech or presentation. The Defendants admit that, in 1994, a Bible appeared on the high school graduation program.

14. The Defendants are without sufficient information either to admit or deny the specific allegations. However, the Defendants do admit that a teacher may have distributed a flier that advertised a revival and that the teacher made comments about the Mormon religion. However, the teacher was promptly reprimanded in writing for his actions.

15. The Defendants admit that a teacher, Theresa Locke, sought to teach some students the song lyrics reflected in Plaintiffs' Exhibit C. The principal later informed Mrs. Locke that the song was inappropriate. The Defendants are without sufficient information either to admit or deny the remaining allegations of this paragraph.

16. The Defendants are without sufficient information either to admit or deny the allegations in this paragraph; however, the Defendants do deny that any such events occurred on "May 5, 1995."

17. The Defendants are without sufficient information either to admit or deny the allegations in this paragraph; however, the Defendants do deny that any such events occurred on "May 6, 1995." The Defendants also deny that the activities alleged in this paragraph were endorsed by the Defendants.

18. The Defendants are without sufficient information either to admit or deny the allegation in this paragraph.

19. The Defendants admit that a teacher may have sent home the note attached as Exhibit D to Plaintiffs' Complaint, but the Defendants deny that the note constituted or reflected official policy of the school district.

20. The Defendants admit that a teacher may have used the Johnny Appleseed song; however, the principal subsequently told the teacher not to use the song.

21. The Defendants deny the allegation.

22. The Defendants admit the allegations in this paragraph; however, the correct title of the presentation was "America, You're too Young to Die."

23. The Defendants admit that baccalaureate services were held on May 22, 1994 at the high school gym and that Dick Shotwell participated. The remaining allegations are denied.

24. The Defendants admit that a student delivered a prayer before each varsity football game.

25. The allegations in this paragraph are denied.

26. The allegations in this paragraph are denied.

27. The allegations of this paragraph are denied.

28. The allegations of this paragraph are denied.

29. The allegations of this paragraph are denied.

30. The allegations of this paragraph are denied. The Defendants deny that the Plaintiffs are entitled to the relief requested.

31. The allegations of this paragraph are denied. The Defendants deny that the Plaintiffs are entitled to the relief requested.

In conclusion, the Defendants respectfully pray that the Court dismiss the Plaintiffs' claims; enter judgment that the Plaintiff take nothing on any of their claims; award the Defendants their attorneys fees and costs; and award the Defendants any other relief to which they are entitled.

Respectfully submitted,

Bracewell & Patterson, L.L.P.

Kelly Frels
State Bar No. 07438000

Lisa A. Brown
State Bar No. 03151470

South Tower Pennzoil Place
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781
Telephone: (713) 223-2900
Telecopy: (713) 221-1212

Attorneys for the Defendants

(Certificate of service omitted in printing)

Doe v. Santa Fe Independent School District:

ORDER

[U.S. District Court, S.D. Tex., May 19, 1995]

Pursuant to the mandate of the United States Court of Appeals for the 5th Circuit, entered this date, the Court hereby amends its Interim Order of May 10, 1995, only to the extent of authorizing recognition of and reference to teachers and administrators of the Defendants school district. Nothing in the Interim Order shall be construed as abridging or restricting the content of presentations of non-employees of the Defendant school district who do not speak in a purely ministerial context or employees of the school district who are ordained ministers but intend to speak in a ministerial context and not as employees of the district. While administrators and employees of the school district may attend and be acknowledged and recognized, they shall not be seated in any unique or specific place denoting endorsement of the ceremony by the district. The purpose of the Interim Order was not to restrict free speech right of expression, but to remove the imprimatur and endorsement of the school district upon the ceremony. All other aspects of the Interim Order remain in full force and effect.

Doe v. Santa Fe Independent School District:

INTERIM ORDER PERTAINING TO PRAYER AT FOOTBALL GAMES

[U.S. District Court, S.D. Tex., Aug. 17, 1995]

At a status conference held on August 4, 1995, the Court established a timetable for resolving the issues presented by this case. The sole purpose of this interim order is to establish guidelines pertaining to prayer at the Santa Fe Independent School District's varsity football games during the upcoming season. Nothing in this Order shall prevent any party from appealing the matters addressed in this Order or any other Orders issued by the Court.

It is hereby ORDERED:

The District's school board may permit the students at the District's high school to vote to include a pre-game prayer at varsity home football games and to select a student volunteer to deliver the prayer. All high school students may participate in the selection process if they so choose; however, the selection procedures previously outlined by the Court in its May 10, 1995 order concerning prayer at graduation must be followed. The pre-game prayer delivered by the volunteer student must be nonsectarian and nonproselytizing. *See Jones v. Clear Creek Indep. School Dist.*, 972 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2950 (1993).

IT IS SO ORDERED.

DONE at Galveston, Texas, on this 16th of August 1995.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

Doe v. Santa Fe Independent School District:

STIPULATIONS

[Filed Feb. 2, 1996 in U.S. District Court, S.D. Tex.]

The parties whose attorneys' signatures appear below agree that the following statements should be treated as undisputed facts for the purpose of the Court's ruling on Defendants' first motion for summary judgment. These stipulations are in no way intended to be admissions of fact. Moreover, a party's agreement to these stipulations is not a waiver of any objections to the admissibility of these statements on, for example, relevance grounds. The agreed to stipulations should not be taken as a complete account of the incidents involved, and represent only that portion of the incident to which they refer.

I. PRELIMINARY MATTERS

1. Plaintiff Jane Doe suing individually and as next friend for her minor children, Jane and John Doe, shall be referred to as Jane Doe I.

2. Minor Plaintiff Jane Doe, on whose behalf Jane Doe I is suing, shall be referred to as Jane Doe II.

3. Plaintiff Jane Doe suing individually and as next friend for her minor child, John Doe, shall be referred to as Jane Doe III.

4. Minor Plaintiff John Doe, on whose behalf Jane Doe I is suing, shall be referred to as John Doe I.

5. Minor Plaintiff John Doe on whose behalf Jane Doe III is suing, shall be referred to as John Doe II.

6. Plaintiff John Doe, who is suing on his own behalf, shall be referred to as John Doe III.

7. At the time of filing of the lawsuit. plaintiffs Jane Doe I and Jane Doe III were parents of children attending schools in the Santa Fe Independent School District.

8. At the time of filing of the lawsuit, plaintiffs Jane Doe I and Jane Doe III both had two children attending schools in the Santa Fe Independent School District.

9. John Doe III is an adult.

10. At the time of filing of the lawsuit, John Doe III attended Santa Fe High School.

11. The Santa Fe Independent School District (Santa Fe ISD) is a political subdivision of the State of Texas and is governed by a seven-person Board of Trustees.

12. Santa Fe ISD has two elementary schools, one intermediate school, one junior high school, and one high school, with a student population of approximately 4,300 - 4,400.

13. Fritz Barnett, Michael Lopez, John Couch, Jan Rothernel, Ruth Krumei, Denise Cowart and Roney McCary are current members of the Board of Trustees of Santa Fe ISD.

14. The Board of Trustees is responsible for establishing policy at Santa Fe ISD.

15. The Board of Trustees is the final policy-maker for the Santa Fe ISD.

16. Richard Ownby is and has been since October 15, 1992, Superintendent of Santa Fe ISD.

II. DISTRIBUTION OF GIDEON BIBLES ON CAMPUS

17. Unless otherwise indicated, the written Santa Fe ISD policies discussed below are the current policies adopted by the Santa Fe ISD Board of Trustees. Unless no dates are given, the dates appearing at the end of each policy are, at the latest, the dates of adoption and amendment, as indicated.

18. Prior to 1995, the following written policies as adopted by the Board of Trustees of Santa Fe ISD were in effect:

Ex. 1:	EMI	Miscellaneous Instructional Policies: Neutrality in Religious Matters (as amended 2/18/91)
Ex.2:	FMA	Student Activities: Publications and Prior Review (as amended 10/17/88).
Ex.3:	FMA (LOCAL)	Student Activities: Publications and Prior Review (as amended 10/17/88).

Ex.4:	GKD (LEGAL)	Community Relations: Community Use of School Facilities (as amended 10/20/94).
Ex.5:	GKD (LOCAL)	Community Relations: Use of School Facilities (adopted 6/17/93).
Ex.6:	GKA	Community Relations: Conduct on School Premises (as amended 6/17/93).
Ex.7:	GKA (LEGAL)	Community Relations: Conduct on School Premises (as amended 2/16/95).
Ex.8:	GKA (LOCAL)	Community Relations: Conduct on School Premises (as amended June 17, 1993).

True and correct copies of these policies are set forth in Exhibits 1 through 8, as indicated.

A. Distribution at the Intermediate School

19. At least as far back as the 1987-88 school year and continuing at least once every year through the 1993-1994 school year, representatives from the Gideons (an organization not affiliated with Santa Fe ISD) requested authorization from the administration of Santa Fe ISD to distribute Bibles at the intermediate School, and were granted authorization to do so. At least once each school year the Gideons distributed their

Bibles at the intermediate school, as follows: The Gideons displayed their Bibles on tables in the lobby of the school at the end of the school day. The tables were the property of Santa Fe ISD. Attached as Exhibit 42 is an accurate plan of the intermediate school. The 2 shaded areas indicate the location of the tables.

20. Jane Doe III voiced her disapproval to the administration of the intermediate school after every distribution during the 1987-88 through 1993-94 school years.

21. Since the first distribution conducted while he was employed by the district, Richard Ownby knew that Gideons were distributing bibles at the intermediate school.

22. The intermediate school principal authorized in advance distribution of bibles at the intermediate school in the 1993-94 school year.

23. Richard Ownby authorized in advance the distribution of bibles at the intermediate school in the 1993-94 school year.

B. 1994 Distribution at the Senior High School

24. Attached as Exhibit 38 is a map of Santa Fe High School. It is a fair and accurate representation of the school's general layout. The shaded areas are sidewalks outside the school building.

25. In April 1994, representatives from the Gideons requested authorization from the administration of Santa Fe ISD to distribute Bibles at the Senior High School.

26. On or about April 14, 1994, at the end of the school day as students were leaving the school, Gideons distributed Bibles on the grounds of the Santa Fe High School.

27. Jane Doe I and Jane Doe III complained to the administration and to the Board about the bible distribution after it occurred.

28. In late April of 1994, Debbie Perkey of the ACLU of Texas voiced her objection regarding the bible distribution by telephone to Richard Ownby.

29. On May 5, 1994, Debbie Perkey sent a letter to Richard Ownby regarding the bible distribution. A true and correct copy of that letter is attached as Exhibit 39.

30. On May 9,1994, Debbie Perkey voiced her objections to the bible distribution to the school board at their workshop meeting.

31. Numerous residents of Santa Fe voiced their support to the administration and to the Board for the bible distribution.

C. Distributions After April 1994

32. The Gideons have not distributed Bibles at Santa Fe ISD schools since April 1994.

33. On October 10, 1995 the Board of Trustees of Santa Fe ISD adopted policy EMI (local): Miscellaneous Instructional Policies: Neutrality in Religious Matters. A true and correct copy of this policy is attached as Exhibit 9.

34. On October 10, 1995 the Board of Trustees of Santa Fe ISD adopted policy GK (Local): Distribution of Literature by Non-Students. A true and correct copy of this policy is attached as Exhibit 10.

35. On August 17, 1995 the Board of Trustees of Santa Fe ISD amended policy FMA (LOCAL): Student Activities: Publication and Prior Review. A true and correct copy of this policy is attached as Exhibit 11.

III. 1994 COMMENCEMENT EXERCISE

36. On June 17,1993, Santa Fe ISD adopted policy EMC: Miscellaneous Instructional Policies: Graduation Exercises. A true and correct copy of this policy is attached as Exhibit 12.

37. Teri Edson, senior class president, gave an invocation at the Santa Fe High School commencement on May 27,1994 as follows:

> "Please bow your heads. Dear heavenly Father thank you for allowing us to gather here safely tonight. We thank you for the wonderful year you have allowed us to spend together as students of Santa Fe. We thank you for our teachers who have devoted many hours to each of us. Thank you Lord for our parents and may each one receive a special blessing. We pray also for a blessing and guidance as each student moves forward in the future. Lord, bless this ceremony and give us all a safe journey home. In Jesus' name we pray."

38. Brittany Lindsey gave a salutatory address at the Santa Fe High School commencement on May 27,1994 as follows:

> "....There is only one thing which we as Christians can truly rely, the faithfulness and strength of a loving God. It is now that each of us must stand on a solid rock of Jesus Christ, stand up for those things on which we believe. Even if it is alone that we must stand. We, having done all, must continue to stand in faith remembering that Christ would have suffered and died for only one of us. So we begin the journey of life, not a life of mediocrity and compromise, but the possible life which Christ has promised, a life of abundance and joy, being confident of this very thing, that he who has begun a good work in you will complete it until the day of Jesus Christ. Thank You."

39. Christy Rice, senior class secretary, gave a benediction at the Santa Fe High School commencement on May 27,1994 as follows:

> "Our most gracious heavenly Father, we thank you for bringing us to this, our graduation. We ask you to be with us as we start a new beginning to our lives. Father, we express our gratitude to all that have helped us over the past three years especially do we thank our parents, teachers, and friends who encouraged us, counseled us, and always extended a helping hand when needed. Please see us safely through this night and the tomorrows of our lives. In Jesus' name Amen."

40. Prior to the commencement, the invocation, salutatory address and benediction given at the commencement were

submitted by the respective students to the principal of the high school. The principal reviewed these materials for compliance with policies FMA and FMA (Local). The principal found all submitted material to be in compliance with these policies, and informed the students that the materials were therefore acceptable for presentation at the graduation ceremony.

41. Schools officials have the power to mute the microphone during a commencement speech.

42. Schools officials have the power to remove a student from a podium during a commencement speech.

43. A bible was displayed on the cover of the Santa Fe 1994 High School graduation program. A true and correct copy of the program is attached as Exhibit 40.

44. A true and correct copy of the 1993 High School graduation program is attached as Exhibit 41.

45. Public funds are used to print the graduation programs.

IV. 1995 COMMENCEMENT EXERCISE

46. On October 20,1994, prior to the commencement of this suit, the Board of Trustees of Santa Fe ISD adopted policy EMC (LEGAL): Miscellaneous Instructional Policies: Graduation Exercises. A true and correct copy of this policy is attached as Exhibit 13.

47. On May 10,1995, the United States District Court for the Southern District of Texas, Samuel B. Kent presiding, entered

an order in this case setting forth procedures for the conduct of any prayer at Santa Fe ISD's 1995 commencement exercises.

48. On May 23,1995, the Board of Trustees of Santa Fe ISD adopted policy EMC (Local). A true and correct copy of this policy is set forth in Exhibit 14.

49. Prior to the 1995 commencement exercise, Richard Ownby met with the senior class officers to discuss the election regarding prayer at graduation.

50. Richard Ownby instructed the students that any invocation or benediction given must be nonsectarian and nonproselytizing.

51. In May 1995, the senior class held an election to determine whether to have an invocation and benediction at the commencement. The senior class officers printed the ballots and publicized the election. The class voted, by secret ballot, to include prayer at the high school graduation.

52. After this vote, the senior class asked for volunteers to deliver the invocation and benediction at commencement. The senior class printed the names of these volunteers on ballots, and on May 19, 1995 held another election to choose which students would deliver the prayers. Votes were taken between 7:00 a.m. and 7:30 a.m., and between 2:30 p.m. and 3:15 p.m. These times are outside normal class hours.

53. In this election the senior class selected two of their classmates, Jerry Du and Stephen Watson, to deliver the invocation and benediction.

54. Prior to the 1995 commencement exercise, as required under the policy of Santa Fe ISD, students submitted all of their commencement speeches for the 1995 commencement to the principal of the high school, with the exception of the invocation and benediction. As in previous years, the speeches were subject to review by the faculty or administration, and school officials had the power during the ceremony to mute the microphone or remove a student speaker.

55. The commencement exercise was held on May 27,1995.

56. The Invocation given by Stephen Watson was as follows:

> "...give thanks to You for keeping Your hand upon the graduating class of 1995. We thank You Oh Lord for keeping us safe through these twelve years of school. Thank You for gracing our lives with two very special people, (inaudible) and (inaudible). Lord, we ask that You keep Your hand upon us during this ceremony and to help us keep You in our hearts through the rest of our lives. In God's name we pray. Amen."

57. The Benediction given by Jerry Du was as follows:

> "Please join me in prayer and bow your head. Dear heavenly Father, as we leave here tonight we wish to express our gratitude for all that You have given us, our families, friends, teachers, administrators, and achievements. We most sincerely praise You and thank You for the wonders You have performed among this group of young people. We thank You for bringing us safely through these past 18 years to this turning point in our lives.

We ask You to continue to guide us along the path of knowledge and virtue, and to help us to seek honesty and courage through You. May we honor You in our peaceful hearts and serve You through our virtuous actions. Lord, we ask that You continue to bless the victims of the terrible tragedy in Oklahoma City and send them Your gospel of love and joy. Now more than ever, Lord, we pray for peace and happiness throughout the world. God, let us remember that forgiveness is the greatest weapon against hate. Father, we also pray that You keep two of our beloved classmates who have passed on ahead of us ever close to You in Your bright kingdom. May the families of (inaudible) and (inaudible) know of the love and sympathy we feel for them. We thank You God for the chance to have known these very special individuals and ask that You bless their loving families with joy and hope. Lord, we ask for Your protection as we depart to our next destination and watch over us as we go our separate ways. Grant each of us a safe trip and keep us secure throughout the night. In Your name we pray. Amen."

V. FUTURE COMMENCEMENT EXERCISES

58. On July 24,1995, the Board of Trustees of Santa Fe ISD adopted EMC(L) - Miscellaneous Instructional Policies: Graduation Exercises. A true and correct copy of policy EMC(L) is set forth in Exhibit 15.

59. With the exception of this modification of policy EMC, Santa Fe ISD has not changed any policies specifically regarding commencement exercises from those in effect in 1995.

VI. 1994 BACCALAUREATE

60. In May 1994, the following written policies of Santa Fe ISD were in effect:

Ex. 16:	FM	Student Activities (as amended 8/19/91)
Ex. 17:	FM (LOCAL)	Student Activities (as amended 4/21/94).

True and correct copies of these policies are attached as Exhibits 16 & 17, as indicated.

61. A baccalaureate is a private religious service for graduating seniors.

62. Santa Fe ISD does not require the attendance of any student at a baccalaureate service.

63. In 1994, the student activities coordinator, while working as a district employee, assisted in organizing a baccalaureate service to be held on school grounds.

64. The baccalaureate service was also noted in the graduation program. Graduation was held the week after the baccalaureate. The programs were printed with school funds.

65. On May 22, 1994, a baccalaureate service was held at the Santa Fe High School gym.

66. On August 8, 1994, Debbie Perkey of the ACLU of Texas voiced her objection to Santa Fe's practices regarding baccalaureate by telephone to Richard Ownby.

67. No rent was charged for use of the school facility.

68. The use of school facilities during non-school hours requires an additional expense to the school for utilities and maintenance.

VII. 1995 BACCALAUREATE

69. On October 20, 1994, Santa Fe ISD adopted the current version of FM (LEGAL). A true and correct copy of this policy is attached as Exhibit 18.

70. On May 10,1995, the United States District Court for the Southern District of Texas, Samuel B. Kent presiding, enterred an order in this case setting forth procedures for the conduct of the baccalaureate for Santa Fe ISD's 1995 graduating class. The Fifth Circuit Court of Appeals modified this order prior to the ceremony.

71. On May 21,1995 a group of local ministers (the Ministerial Alliance) rented the high school gym and conducted a baccalaureate service there. This service occurred outside of normal school hours. The school district charged rent of $221 for use of the gym. A true and complete copy of the rental agreement is attached as Exhibit 19.

72. The service was noted in the graduation program. Graduation occurred the next week. The graduation program

was printed with school funds, several weeks before graduation.

73. True and correct copies of the 1993 and 1994 baccalaureate programs are attached as Exhibit 44.

VIII. DAVID WILSON INCIDENT

74. Santa Fe ISD has adopted the following policies regarding Employee Standards of Conduct, with effective dates as indicated:

Ex. 21: DH (as amended 8/19/91)

Ex. 22: DH (LOCAL) (as amended 11/16/92)

Ex. 23: DH (LEGAL) (as amended 2/16/95)

Ex. 24: DH (LOCAL) (as amended 2/16/95)

Ex. 25: DH(E)(EXHIBIT) (exhibit to policies DH and DH (LEGAL)).

True and correct copies of these policies are attached as Exhibits 21-25, as indicated.

75. On April 5, 1993, teacher David Wilson handed out flyers announcing a coming revival in Jane Doe II's seventh grade history class.

76. In a conversation that ensued, in response to questions from another student, Jane Doe II said that she was a Mormon. Mr. Wilson replied that Mormons are a cult. Mr. Wilson stated that the Mormons were not Christians. Mr. Wilson told his students that Mormons use the "Mormon" Bible. Mr. Wilson told his students that Mormons practice polygamy.

77. All of Mr. Wilson's remarks were made in front of students besides Jane Doe II.

78. All of Mr. Wilson's remarks about the Mormon religion were made during class time.

79. During class, other students directed comments to Jane Doe II that demeaned her religion.

80. On April 6,1993, Jane Doe I called the junior high school to set a meeting with the principal. On April 7, 1993, Jane Doe I met with the principal and voiced her concerns regarding the incident.

81. Santa Fe ISD reprimanded Mr. Wilson in writing for this incident. A true and correct copy of that reprimand is attached as Exhibit 20.

82. On April 16, 1993, at the instruction of his principal, Mr. Wilson apologized to his class for this incident. The apology did not refer to any specific student.

83. Also on April 16, at the instruction of his principal, Mr. Wilson met privately with the principal, Jane Doe I, and Jane Doe II, and personally apologized to them for this incident.

IX. SIGN LANGUAGE

84. In May 1994, John Doe I was a third grader at Santa Fe Elementary School.

85. On May 2, 1994, John Doe I's teacher, Theresa Locke, sent home with her students, a permission slip seeking parental approval for use of a religious song to teach sign language. A true and correct copy of the permission slip is attached as Exhibit 26.

86. On May 3,1994, Jane Doe I returned the permission slip to Ms. Locke marked "No" indicating her son should not be taught the religious song. Also on May 3rd, Jane Doe I spoke by telephone to the principal of the elementary school regarding her concerns that a religious song was being taught and requested a copy of the words to the song.

87. On May 5, 1994, Ms. Locke taught the religious song during social studies class. Prior to teaching the song, Ms. Locke sent John Doe I and another student to stand outside the classroom without adult supervision while she taught the song.

88. Again on May 6, 1994, John Doe I was sent outside the classroom unsupervised while the song was taught, but this time he was sent out alone.

89. John Doe I stood outside unsupervised for ten to fifteen minutes on both of these occasions.

90. On May 9, 1994, Jane Doe I met with the principal of the elementary school about the teaching of a religious song, and

that her young son was left outside unsupervised for ten to fifteen minutes on at least two occasions. During this meeting, the principal provided Jane Doe I with a copy of the lyrics to this song. A true and correct copy of the lyrics to this song is attached as Exhibit 27.

91. After speaking with Jane Doe I on May gth, the principal met with Ms. Locke and told her that no student should be left in an unsupervised setting. The principal also directed Ms. Locke to use a different song or to omit the portion of the song referring to "Jesus, Lord Jesus".

92. Ms. Locke had taught this song to her students in the past.

X. PARENTAL NOTE

93. On August 16, 1994, Beverly Clayton was a teacher at Santa Fe Elementary School.

94. On August 16, 1994, Beverly Clayton sent home with students, including John Doe II, a letter to parents. A true and complete copy of this letter is attached as Exhibit 28.

XI. JOHNNY APPLESEED SONG

95. During the 1992-93 and 1993-94 school years, teacher Beverly Clayton distributed to her students, including John Doe II, the Johnny Appleseed Song. Ms. Clayton also led her class in the Johnny Appleseed Song just prior to lunch on most days during the 1992-93 and 1993-94 school years.

96. In August 1994, Jane Doe III requested a copy of the Johnny Appleseed Song ftom Ms. Clayton. Ms. Clayton questioned John Doe II why his mother wanted a copy. John Doe II replied that his parents wanted to see it because it might not agree with their church. Ms. Clayton asked what church he belonged to.

97. Ms Clayton responded with a note, which included the lyrics to the Johnny Appleseed Song. A true and correct copy of that note is attached as Exhibit 29.

98. Jane Doe III then complained to Mr. Ownby about the Johnny Appleseed Song.

99. Debbie Perkey of the ACLU of Texas then complained to the administration about the Johnny Appleseed song, in a teleconference with Mr. Ownby and Ms. Clayton's principal.

100. After the telephone conference with Debbie Perkey, Ms. Clayton was instructed by the administration to discontinue the use of the Johnny Appleseed Song.

XII. RELIGIOUS CLUB MEETINGS

101. In addition to the board policies referenced above, class and club organizations are governed by the student-parent handbook, and the constitutions of that club. True and correct excerpts ftom the 1995-96 Santa Fe High School Student-Parent Handbook are attached as Exhibit 43.

102. All school clubs and organizations are required to have membership rules.

103. Rules of all school clubs and organizations are reviewed in advance by a faculty or administration member, and approved if in conformity with Santa Fe ISD policies and the rules set forth in the student handbook.

104. "JOY" of the Joy Club stands for "Jesus Others You."

105. The Joy Club was a Christian organization with a religious purpose.

106. The Joy Club met in November 1993 during regular school hours.

107. A true and correct copy of page 52 of the 1993 Santa Fe Junior High Year Book is attached as Exhibit 30.

108. A true and correct copy of page 41 of the 1994 Santa Fe Junior High Year Book is attached as Exhibit 31.

109. During the 1992-1993 and 1993-1994 school years, the principal of the Jr. High School knew that the Joy Club had a religious purpose.

110. A true and correct copy of a document entitled "Santa Fe High School Organization Handbook 1994-1995" is attached as Exhibit 32.

111. Attached are true and correct copies of pages 77, 78, and 145 of the 1988 Santa Fe War Whoop (the high school yearbook) as Exhibit 39.

XIII. ASSEMBLY: "AMERICA YOU'RE TOO YOUNG TO DIE"

112. On October 21, 1993 at a regularly scheduled meeting to the Board of Trustees of Santa Fe ISD, Rev. Alan Splawn, representing the Ministerial Alliance, requested the district allow "America You're Too Young to Die", a live presentation by Life Action Ministries, to be presented to junior and senior high school students during the school day. A true and complete copy of the recorded minutes of that meeting is attached as Exhibit 33. The Board took no action on the request.

113. The script from the unedited program had religious content. A true and correct copy of the script along with the edits made is attached as Exhibit 34.

114. The administration was aware that this unedited program had religious content.

115. Members of the Board of Trustees was aware that this unedited program had religious content.

116. Parents were required to give written permission for their children to attend the presentation.

117. Prior to the date of the performance, Santa Fe ISD received complaints ftom their employees, parents of their students, and from Debbie Perkey of the ACLU regarding its religious content.

118. Santa Fe ISD also received numerous requests from their employees, parents of their students, and other residents of Santa Fe for the district to show the presentation to the students unedited.

119. Santa Fe ISD did not permit the unedited version of the presentation to be performed during normal school hours.

120. On November 22, 1993, the edited version of the program, as described in Exhibit 34, was performed for the junior and senior high school students during regular school hours.

121. On the evening of November 22, 1993, the unedited version of the program was shown in the high school gym. The Ministerial Alliance rented the gym for this purpose, paying $194 to the school district. A true and complete copy of that agreement is attached as Exhibit 35.

122. Santa Fe ISD did not require attendance of its students at this presentation.

XIV. FOOTBALL

123. Before this suit was filed, a prayer was said over the public address system before varsity home football games by the student council chaplain. The chaplain is an officer of the Student Council of Santa Fe High School. A true and correct copy of the current Constitution of the Student Council of Santa Fe High School is attached as Exhibit 36.

124. Prior to this lawsuit, prayers were said over the public address system before high school baseball games.

125. During each season, there are at least three to six home varsity high school football games.

126. High school cheerleaders are required to attend high school football games, including the pre-game ceremonies including the prayer.

127. Band is an elective course for which some students receive credit towards graduation.

128. High school band members are required to attend high school football games, including the pre-game ceremonies including the prayer.

129. On August 18,1995, the Board of Trustees of Santa Fe ISD adopted new policy FN(LOCAL)- Student Activities: Pre-Game Ceremonies at Football Games. A true and correct copy of that policy is attached as Exhibit 37.

130. On August 31, 1995, the district's high school students voted to determine whether a student would deliver prayer at varsity football games. The student council president and vice president organized and publicized the election on whether to have a prayer. The student council publicized the election for four days prior to the actual election. There was no campaigning. The student council representatives printed the ballots and counted the votes. The students chose to allow a student to say a prayer at football games.

131. After the students held the election on whether to have a prayer, the students held a second election to determine which student would deliver the prayer. This election was publicized for three days in advance of the election date of September 7, 1995. The students who voted selected Laurie Thompson to deliver the prayer at varsity football games.

DATE: 2 Feb. 96

Respectfully submitted,

ANTHONY P. GRIFFIN
ATTORNEY-IN-CHARGE
ANTHONY P. GRIFFIN, INC.
LAWYERS
1115 MOODY
GALVESTON, TEXAS 77550
409/763-0386
1/800/750-5034
FACSIMILE NO. 409/763-4102

STATE BAR NO.08455300
FEDERAL ID NO. 4736

ATTORNEYS FOR THE
PLAINTIFF

KELLY FRELS
STATE BAR NO. 07438000
ATTORNEY-IN-CHARGE

LISA A. BROWN
STATE BAR NO. 03151470

REAGAN D. PRATT
STATE BAR NO. 00788218

BRACEWELL & PATTERSON, L.L.P.
SOUTH TOWER PENNZOIL PLACE
711 LOUISIANA, SUITE 2900
HOUSTON, TEXAS 77002
713/223-2900
FACSIMILE NO. 713/221-1212

ATTORNEYS FOR DEFENDANTS

Exhibit 3

SANTA FE ISD
084909

STUDENT ACTIVITIES: FMA
PUBLICATIONS AND PRIOR REVIEW (LOCAL)

GENERAL PROVISIONS

All publications edited, printed, or distributed in the name of or within the District schools shall be under the control of the school administration and the Board. All publications approved and issued by individual schools shall be part of the instructional program, under the supervision of a faculty sponsor, and all shall be carefully edited to reflect the high ideals and expectations of the citizens of the District for their schools. The exercise of appropriate economy in materials and production is expected without jeopardy to the content. The principal shall be responsible for all matters pertaining to the organization, issuance, and sale of such publications and any other publication procedure, subject to the Superintendent's approval.

Students who have a complaint regarding the procedures or a

professional decision affecting the content or style of a school-sponsored publication shall present that complaint in accordance with FNG (LOCAL).

PRIOR REVIEW OF NONSCHOOL MATERIALS

All written material over which the school does not exercise editorial control that is intended for distribution to students shall be submitted for prior review according to the following procedures:

1. Material shall be submitted to the building principal or designee for review.

2. The principal or designee shall approve or disapprove submitted material within 24 hours of the time the material is received. Failure to act within the 24-hour period shall be interpreted as disapproval.

3. The student may appeal disapproval to the Superintendent, who shall decide the appeal within three days of its receipt. Failure of the Superintendent to act within

the three-day period shall be interpreted as disapproval.

4. If the request to distribute material was initiated by a student, disapproval may be appealed to the Board under FNG and FNG (LOCAL), beginning at Level Three. If the request to distribute material was initiated by someone other than a student, disapproval may be appealed to the Board under GF and GF (LOCAL), beginning at Level Three.

Students who fail to follow the procedures for submitting material for approval shall face disciplinary action. (See FO, FOA, FOD) Appropriate law enforcement officials shall be called when someone other than a student refuses to follow the procedures for submitting materials and fails to leave the premises when asked. (See GKA)

ADVERTISING

Student publications, excluding the annual yearbook, shall not accept advertising. Advertising in individual school publications may be accepted

from bona fide business firms, subject to the approval of professional employees exercising editorial supervision over the publications. Advertising deemed inappropriate for student readers or that advertises products presenting a health hazard, such as alcohol or tobacco products, shall not be accepted.

Exhibit 16

[Text in handwritten font was handwritten on original]

SANTA FE ISD
084909

Replaced with new policy but was in effect 11/93

STUDENT ACTIVITIES FM

PARTICIPATION ELIGIBILITY

A student in grades 7-12 may participate in extracurricular activities on or off campus at the beginning of the school year only if the student has earned the cumulative number of units in state-approved courses indicated below:

FIRST SIX-WEEK PERIOD

1. Beginning of the seventh grade year -- have been promoted from the sixth grade to the seventh.

2. Beginning of the eighth grade year -- have been promoted from the seventh grade to the eighth.

3. Beginning of the ninth grade year -- have been promoted from the eighth grade to the ninth.

4. Beginning of the tenth grade year -- at least five units toward graduation.

5. Beginning of the eleventh grade year -- at least ten units toward graduation.

6. Beginning of the twelfth grade year -- at least 15 units toward graduation.

SUBSEQUENT SIX-WEEK PERIODS

In order to be eligible to participate in an extracurricular activity event for a six-week period following the initial six-week period of a school year, a student shall not have a recorded grade average lower than 70 on a scale of 0-100 in any course for the preceding six-week period.

19 TAC 97.113 (c), (d)

SUSPENSION FROM EXTRACURRICULAR ACTIVITIES

A student whose recorded six-week grade average in any course is lower than 70 at the end of a six-week period shall be suspended from participation in any extracurricular activity event during succeeding six-week periods until the end of a six-week period during

which the student achieves a course grade average for that six-week period of at least 70 in each course. This suspension shall become effective seven days after the last day of the six-week period during which the grade lower than 70 was earned.

HANDICAPPED STUDENTS

Suspension of a handicapped student whose handicap significantly interferes with the student's ability to meet regular academic standards shall be based on the student's failure to meet the requirements of the student's Individual Education Plan, as determined by the ARD committee.

EXCEPTIONS FOR HONORS/ ADVANCED COURSES

The campus principal may remove this suspension if the class is identified as an honors class [see EHDC] or is an advanced class, as follows:

1. English language arts: English IV Academic (Comp.), English IV Academic (British Literature), World Literature, Creative/Imaginative Writing, Research/Technical Writing, Debate III, Public Speaking III.

2. Other Languages: Other Languages III, Advanced Languages I-IV.

3. Social Studies: Advanced Social Science Problems.

4. Fine Arts: Art IV, Theatre Arts IV, Band IV, Orchestra IV, Choral Music IV, Stage Band IV, and Music Theory I-II.

5. Mathematics: Trigonometry, Elementary Analysis, Analytic Geometry, Pre-Calculus, Linear Algebra, Calculus.

6. Science: Physics, Physics II, Chemistry II, Biology II.

OUT-OF-SCHOOL PRACTICE

A student who has been suspended from extracurricular activity events shall also be suspended from out-of-school practice in extracurricular activities until suspension from participation has been lifted.

19 TAC 97.113(e)-(g); Education Code 21.920(b)

LIMIT ON SUSPENSION	A student may not be suspended from participation during the period in which school is recessed for the summer or during the initial grade reporting period of a regular school term on the basis of grades received in the final grade reporting period of the preceding regular school term. *Education Code 21.920(c)*
REINSTATEMENT TO EXTRACURRICULAR ACTIVITIES	At the end of any six-week period in which a student attains a course grade average for that six-week period of 70 or more in each course taken, any suspension from participation in extra-curricular activities and/or suspensions from out-of-school practice for extracurricular activities shall be removed. *19 TAC 97.113(h)*
PRACTICE AND PERFORMANCE TIME	Students may practice outside the school day in any single extracurricular activity a maximum of eight hours per school week. The District shall not schedule more than one contest or performance per activity per student per school week, unless the commissioner of education has

made an exception based on the District's limited facilities.

The District may schedule more than one contest or performance per activity per student per school week to accommodate tournaments, post-season competition, and contests postponed by weather or public disaster when the performance or contest is sponsored by UIL or other school-sanctioned organization.

19 TAC 97.113(k)

"10-DAY RULE"	The District shall not schedule, nor permit students to participate in, any school-related or -sanctioned activities on or off campus that would require, permit, or allow a student to be absent from class in any course more than ten times during the 175-day school year (full-year course). *19 TAC 97.113(a)*
EXCEPTIONS	The District shall inform the commissioner of education of specific exceptions to the ten absences per class limitation stated above. Such exceptions shall be made only on behalf of individual

students who are competing in UIL-sponsored activities or in post-district competitions sponsored by other organizations approved by the commissioner of education. The exception shall be based on circumstances that are unforeseen and that result from the student's earning the right to compete at post-district levels. Exceptions shall not exceed a total of five additional absences per year. Exceptions shall not be granted to allow students who have not earned the right to compete at the post-district level to participate in more district-level activities than permitted under the ten absences per class limitation. *19 TAC 97.113(b)*

SANCTIONED ACTIVITIES

All UIL-sponsored activities are sanctioned as school-related activities and, therefore, come under the provisions of this policy. Other organizations may be recognized as sanctioned school activities, subject to all provisions of this policy, upon approval by the commissioner of education and the Board. If approval is not granted by both the commissioner and the Board, any absences incurred by a

student in order to participate in that organization's activities shall be unexcused. *19 TAC 97.113(i)*

DEFINITIONS

Definitions of curricular, cocurricular, and extracurricular activities shall be as follows:

1. Curricular activities occur within the regular school day and constitute the delivery of instruction as specified in 19 TAC, Chapter 75.

2. Cocurricular activities are an extension of classroom instruction in which participation is by the entire class or a significant portion thereof. They relate directly to, and enhance student learning of, essential elements through participation, demonstration, illustration, and observation. Cocurricular activities are included in the teacher's instructional plan and are conducted by or supervised by a classroom teacher or other educational professional such as a librarian, school nurse, counselor, or administrator.

Students suspended from extracurricular activities because of a six-week grade(s) below 70 shall not be prevented from participating in after-school cocurricular activities. Absences for participation in cocurricular activities that require a student to miss a class other than the sponsoring class or course shall be counted under the ten-day rule.

3. Extracurricular activities are school-sponsored activities that are not directly related to instruction of the essential elements, but that may have an indirect relation to some areas of the curriculum. They offer worthwhile and significant contributions to a student's personal, physical, and social development. Participation in extracurricular activities is a privilege and not a right, and students must meet specific requirements in order to participate. Activities may include, but are not limited to, performances, contests,

demonstrations, displays, and club activities.

19 TAC 97.113(m)

ISSUED DATE: 10/19/90
UPDATE 38
FM (H)-P

SANTA FE ISD
084909

STUDENT ACTIVITIES FM

EQUAL ACCESS ACT

If a District secondary school has a limited open forum, as defined below, it shall not deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings. *20 U.S.C. 4071(a)*

LIMITED OPEN FORUM

A District secondary school has a limited open forum whenever the school grants an offering to or an opportunity for one or more noncurriculum-related student groups to meet on school premises during noninstructional time. *20 U.S.C. 4071(b)*

"Noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends. *20 U.S.C. 4072(4)*

"Noncurriculum-related student group" means any student group that does not directly relate to the body of courses offered by the school. A student group directly relates to the school's curriculum if it meets any of the following criteria:

1. The subject matter of the group is actually taught or will soon be taught in a regularly offered course.

2. The subject matter of the group concerns the body of courses as a whole.

3. Participation in the group is required for a particular course.

4. Participation in the group results in academic credit.

Westside Community School v. Mergens, 110 S.Ct. 2356 (1990)

If a school has a limited open forum, it shall be deemed to offer a fair opportunity for students to conduct meetings within its forum if it uniformly provides that:

1. The meeting is voluntary and student-initiated.

2. There is no sponsorship of the meeting by the school or any government or its agents or employees.

3. School employees are present at religious meetings only in a nonparticipatory capacity.

4. The meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school.

5. Nonschool persons shall not direct, conduct, control, or regularly attend activities of student groups.

20 U.S.C. 4071(c)

The establishment of a limited open forum shall not authorize the school or the District to:

1. Influence the form or content of any prayer or other religious activity.

2. Require any person to participate in prayer or other religious activity.

3. Expend public funds beyond the incidental cost of providing the space for student-initiated meetings.

4. Compel any school agent or employee to attend a meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee.

5. Sanction meetings that are otherwise unlawful.

6. Limit the rights of groups of students that are not of a specified numerical size.

7. Abridge the constitutional rights of any persons.

20 U.S.C. 4071(d)

MAINTAIN ORDER

The establishment of a limited open forum shall not limit the authority of the school, the District, its agents, or its employees to

maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.
20 U.S.C. 4071(f)

ISSUED DATE: 02/21/91 ADOPTED: 1-18-88
UPDATE 39 AMENDED: 2-18-91
FM (H)-P. Aug. 19, 1991

Exhibit 36

CONSTITION OF THE STUDENT COUNCIL
OF SANTA FE HIGH SCHOOL

ARTICLE I
Name

This organization shall be known as the Student Council of Santa Fe High School.

ARTICLE II
Purpose

The purpose of this organization shall be:

1. To bring about closer cooperation between the faculty and the student body as representatives of the student body.
2. To cooperate with administration in all problems concerning the school and the student body.
3. To create and maintain school spirit, morale, and respect.
4. To help make this a better school for the community, the faculty, the student, and ourselves.

ARTICLE III
Powers of the Student Council

Section A. The Student Council reserves the right to the following powers:

1. To charter all clubs.
2. To evaluate all Student Council projects, programs, and special events.
3. To run all school elections.
4. To send two delegates to each school board meeting.
5. To conduct assemblies.
6. To organize special events such as Homecoming, Sweetheart Night, Parent's Night, Pow Wow, etc.

Section B. The Advisors of Santa Fe High School Student Council is/are recognized as having the RIGHT TO VETO ANY ACTION of the Student Council which is not standing with present policies.

ARTICLE IV
Membership

Section A. The Student Coucil shall consist of:

1. The Executive Board, made up of the President, Vice-President, Corresponding Secretary, Recording Secretary, Treasurer, Sergeant at Arms, Chaplin, and the Chief Representative.
2. The Assembly, which is composed of four representatives from each class, plus the presidents of the four classes and members of the work-on council.

Section B. A quorum shall consist of fifty percent of the membership plus one.

ARTICLE V
Duties and Responsibilities of the Student Council

The Student Council is responsible for the following duties:

1. School visitor ushering.
2. Constitutional Re-evaluation.
3. Duties related to Student Council activities.
4. Promoting school morale and pride.
5. Keeping the school and the community aware of all Council activities.
6. Any duty or responsibility assigned to the Student Council by the administration.

ARTICLE VI
Amending the Constitution

The Constitution may be ammended by a quorum vote of the Student Council.

BY-LAWS

ARTICLE I
Qualifications for Candidates

Section A. Officers of the Student Council shall:

1. Have an 85 overall average.

2. Have at least one year of experience on the Student Council.
3. The president must be a member of the Senior Class, unless he/she is an underclassman filling the vacated office.
4. All other officers must be a sophomore, Junior, or Senior.
5. Both the Corresponding Secretary and the Recording Secretary must know how to type.

Section B. Representatives and work-on Student Council members shall:

1. Have an 80 overall average.
2. Have a desire to serve.

Section C. Special Permission

1. If a candidate for any Student Council position has been suspended from school for a disciplinary action, he/she may not run for Council.

ARTICLE II
Elections

Section A. Officers

1. The Officers of the Student Council shall be elected during the fifth Six weeks of the year preceding their term. The specific date is left to the descretion of the Executive Board and the Principal.

2. Candidates must obtain a petition from a council sponsor and return it complete with 25 student signatures, 3 teacher signatures, and a paragraph stating why they are running for that office at least one week before the date of the election.
3. Officer Elections (except President) After Representatives are elected for next school year council (all reps.) meets and take officer nominations from council.

   Each officer is elected by majority (secret ballots) of reps. present.

   Elections are run by current President (with assist of sponsor) according to parliametary procedure.

4. Results will be determined by a simple majority vote for one candidate. If the majority vote is not cast for a single candidate, there shall be a run-off election held within one week.

Section B. Representatives

1. Candidates must obtain a petition from a council sponsor and return it complete with 5 student signatures, 3 teacher signatures, and a paragraph stating why they are running for representative at

least one week before the date of the election. Candidated will not be allowed to give a compaign speech before their class.

3. The class representatives shall be elected in the spring of the year preceding their term of office.
4. The representatives shall be elected by their respective classes.
5. The Chief Representative, elected in the spring shall be the Senior representative with the most seniority. If there is a tie, the senior representative having the most votes will serve this position. The Chief Representative is to be counted as one of the four representative of the Senior Class.

Section C. Work-on Council

1. Candidates must obtain a petition from a council sponsor and return is complete with 5 student signatures, 3 teacher signatures, and a paragraph stating why they are running for council.
   The first cut will be made after the grade survey to make sure the grades average to 80 overall.
3. Teacher evaluation will be read and considered in the next step to Work-on Council.
4. An interview with the executive board and Student Council sponsors will be set up which the candidates must attend.

5. The Work-on council member shall be elected by the executive board and the sponsors by a majority vote.

ARTICLE III
Duties and Responsibilities of the Officers and Representatives

Section A. Officers

1. The President shall:
   a. Preside over all meetings of the Student Council, the Student Body, and the Executive Board.
   b. Call special meetings, with permission from the advisor.
   c. Be responsible for carring out the purpose of the Council.
   d. Be the official representative of the Student Body.

   The Vice President shall:
   a. Serve as the presiding officer in the absence of the President.
   b. Appoint and preside over all committees.
   c. Serve as President if office is vacated.

3. The Recording Secretary shall:
   a. Keep the minutes of all Student Council and Executive Board meetings.
   b. Keep files up-to-date.

c. (illegible)
proper people.
e. Be responsible for writing
Outstanding Council report.

4. The Corresponding Secretary shall:
   a. Send, receive, and answer all outside correspondence at the direction of the Student Council.
   b. Take over the duties of the Recording Secretary in case of his/her absence or inability to serve.
   c. Record attendance at all meetings.
   d. Provide information on Council activities to local newspaper.
5. The Treasurer shall:
   a. Keep a record of all money held, acquired, and disbursed by the Student Council and make a report of this record at each Council Meeting.
   b. Be present at all money-making projects.
   c. Be responsible for the general operation of any vending machine.
6. The Chaplain shall:
   a. Lead the Pledge of Allegiance and say the prayer at all meetings, athletic events and other occasions when the Student Council is asked to do this.
   b. Will assist the Sergeant-at-Arms in keeping points.
7. The Sergeant-at-Arms shall:
   a. Keep order in all meetings.

   b. Keep records of all points earned by members.
8. The Chief Representative shall:
   a. Hold meetings with representatives to discuss problems or gain suggestions.
   b. Talk to the Executive Board for the representatives.
   c. Attend all Executive Board meetings.
   d. Keep calendars of events.
   e. Post all minutes, agendas, and calendars in class rooms, etc.
   f. Hold an orientation for the new council members as soon as possible after elections are complete.
9. All officers shall be required to maintain an 85 average, receive no more than one "U" in conduct, and not be sent to Alternative School or suspended from school during a tenure of office. Failure to meet any of these requirements will result in immediate removal from office.

Section B. Representatives and Work-On Council members shall:

1. Maintain an 80 average, receive no more than one "U" in conduct, and not be sent to Alternative School or be suspended from school during a tenure of office. Failure to meet any of these requirments will result in immediate removal from office.

2. Participate in all activities of the Student Council.
3. Inform respective classes of activities of the Student Council. (Representatives)
4. Gather information from respective classes to report to the Student Council. (Representatives)

Section C. The Executive Board

1. Review all candidate qualifications for the Student Council.
2. Advise the Student Council that a candidate should not be allowed to run if he does not meet the requirements.
3. Run all Council meetings.
4. Do all the above with approval of the Advisor and Principal.

ARTICLE IV
Meetings

Section A. The Student Council shall been at least once a week, conditions permitting
The day of the week shall be set at the beginning of the year.

Section B. The President has the power to call any special meetings. If anyone feels that a special meeting is necessary, he should contact the President.

ARTICLE V
Dismissal of members

Section A. An officer or representative may be removed from office for any neglection of duties expressed in this constitution, or not meeting the minimum number of points according to the point system.
An officer or representative may be removed from office by being assigned to the alternative school, home campus or expelled.
An officer or representative may be removed from the council for conviction of misdemeanors or felonies.

Section B. The process for removal shall be as follows:

1. All action for removing either an officer or representative from office must begin in the Executive Board. However, any member may initiate this action.
2. If a simple majority of the Executive Board feel that an officer has not met the requirements set forth in Article V, Section A, the issue will then be brought before the entire Student Council. If a simple majority of the Student Council feels as if he/she has not bet the requirements set forth in Article V, Seciton A.

Section C. If an officer or representative is found guilty of misconduct according to Article V. Section A, during this tenure of office, he will automatically be asked to resign

ARTICLE VI
Vacancies

Section A. If a representative or work-on council member vacates his or her office for any reason during the first semester of the school year, a new person will be moved up from the list of people running who did not make the council.

Section B. If the President is removed from office or leaves the school, the Vice President then becomes President. A new Vice President shall then be elected from within the Student Council.

Section C. If any other office is vacated, an election will be held within the Council.

Section D. If an office becomes vacant after 1st semester, the work will be covered by other officers. No replacement will be chosen, since this would not be fair when demerits are counted for the year.

ARTICLE VII
Amending the By-Laws

The By-Laws may be amended by a quorum vote of the Student Council.

Exhibit 37

[Text in handwritten font was handwritten on original]

Santa Fe ISD
084909

STUDENT RIGHTS AND RESPONSIBILITIES FN (LOCAL)

STUDENT RIGHTS	Each student is expected to respect the rights and privileges of other students, teachers, and District staff; all teachers, administrators, and other District personnel are expected to have respect for the rights and privileges of students.
PRAYER AT FOOTBALL GAMES	The Board has chosen to permit invocations to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event and to establish the appropriate environment for the competition. Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an

election, by the high school student body, by secret ballot, to determine if invocations are to be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the invocations.

If the District is enjoined by court order from enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the District.

The Board has chosen to permit nonsectarian, nonproselytizing invocations to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot,

to determine if invocations are to be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the invocations.

DISCIPLINE MANAGEMENT PLAN

The Board, in accordance with legal requirements, has adopted a local Discipline Management Plan. The plan includes a list of student responsibilities, and is intended to provide comprehensive information regarding student conduct and discipline. [See policy series FN and FO]

STUDENT HANDBOOK

A student handbook containing information useful to students and parents and the code of student conduct shall be distributed at the beginning of the school year to all students and parents, teachers, and administrators. It shall also be provided to new professional employees, newly enrolled students, and any other person on request. Changes during the year shall be published and distributed during the next

semester, but no later than the beginning of the next school year.

Each student and parent upon issue of the student handbook shall sign a statement that they have received and read it; parents annually shall acknowledge their responsibilities outlined in the student code of conduct.

The administration shall periodically review student handbooks and recommend revisions to the Board for its approval. Student handbooks are approved by the Board and constitute an extension of Board policy. Violation of conduct provisions contained in the handbooks shall result in disciplinary action. [See FO, FOA, FOD]

DATE ISSUED: 09/04/95
LDU-36-95
FN(LOCAL)-X

ADOPTED: 1-18-88
3-21-88
OCT 10 1995

Doe v. Santa Fe Independent School District:

AMENDED STIPULATION OF FACT

[Filed Feb. 20, 1996 in U.S. District Court, S.D. Tex.]

On February 2, 1996, the parties filed Stipulations of Fact and numerous exhibits with the Court. One of the exhibits, Exhibit 37, a copy of a school district policy coded FN (Local), is incorrect. A superseded version of the policy was erroneously attached to the stipulations. The correct version of Policy FN (Local) is attached to this amended stipulation. This amended stipulation is filed with the consent of Plaintiffs' counsel, Debbie Perkey of the ACLU.

Respectfully submitted,

Bracewell & Patterson, L.L.P.

Kelly Frels
State Bar No. 07438000

Lisa A. Brown
State Bar No. 03151470

South Tower Pennzoil Place
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781
Telephone: (713) 223-2900
Telecopy: (713) 221-1212
Attorneys for the Defendants

STUDENT ACTIVITIES: FN (LOCAL)
PRE-GAME CEREMONIES AT FOOTBALL GAMES

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing.

(Certificate of service omitted in printing)

DEC 29 1999

FILED
DEC 29 1999
CLERK

No. 99-62

IN THE

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

vs.

JANE DOE, individually and as next friend for her minor children Jane and John Doe, Minor Children; **JANE DOE #2**, individually and as next friend for her minor child, John Doe, Minor Child; and **JOHN DOE**, individually,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

JOHN G. STEPANOVICH
THOMAS P. MONAGHAN
STUART J. ROTH
JOHN P. TUSKEY
JOEL H. THORNTON
DAVID A. CORTMAN
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent Univ. Drive
Virginia Beach, VA 23464
(757) 226-2489

KELLY SHACKELFORD
509 Cutter Lane
Allen, TX 75013
(972) 423-8889

JAY ALAN SEKULOW*
COLBY M. MAY
JAMES M. HENDERSON, SR.
MARK N. TROOBNICK
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
Suite 609
1000 Thomas Jefferson St., NW
Washington, DC 20007
(202) 337-2273

PAUL D. CLEMENT
KING & SPALDING
1730 Pennsylvania Ave., NW
Washington, DC 20006
(202) 626-2640

**Counsel of Record*

Attorneys for the Petitioner

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DEC 29 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED

Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.

PARTIES

All of the parties to the proceeding in the Court of Appeals are listed in the caption. Petitioner Santa Fe Independent School District is a public school district in Galveston County, Texas. The respondents are individuals suing pseudonymously. Their true names have been listed on a separate document filed under seal with the Court.

There are no parent or subsidiary corporations required to be disclosed under Rule 29.6.

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DECISIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported as *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999). The Fifth Circuit's denial of rehearing and rehearing en banc, and the dissent therefrom, are reported at 171 F.3d 1013 (5th Cir. 1999). The pertinent orders of the District Court are unreported. *See* JA 28 (dkt. 4), 41(dkt. 13), 42 (dkt. 16); Pet. App. at E1 (dkt. 29), D1 (dkt. 66).[1] A published decision of the District Court on confidentiality matters appears as *Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647 (S.D. Tex. 1996).

JURISDICTION

The U.S. Court of Appeals for the Fifth Circuit rendered its panel decision on February 26, 1999, and denied a timely petition for rehearing and rehearing en banc on April 7, 1999. Petitioner timely filed its petition for a writ of certiorari on July 2, 1999. This Court granted the petition on November 15, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICY

The pertinent part of the First Amendment to the U.S. Constitution is as follows:

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[1] "JA" means Joint Appendix, "dkt." refers to the District Court docket number, and "Pet. App." means the Appendix to the Petition for Certiorari. Other abbreviations used herein include "Pet." for the Petition for Writ of Certiorari and "Tr." for a hearing transcript (*e.g.*, Tr. 11/3/95 means "transcript of the hearing held on Nov. 3, 1995").

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech . . . .

U.S. Const. amend. I.

The first section of the Fourteenth Amendment to the U.S. Constitution provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The school district policy governing pre-game ceremonies at football games is set forth in its entirety in the Appendix to the Petition, Pet. App. at F1-F2, and in relevant part below.

STATEMENT OF THE CASE

In October 1995, the Santa Fe Independent School District ("Santa Fe") adopted the contested policy, entitled Pre-Game Ceremonies at Football Games ("Football Policy"). The Football Policy provides as follows:

PRE-GAME CEREMONIES AT FOOTBALL GAMES

> The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

Pet. App. at F1. The policy goes on to specify that if it "is enjoined by a court order," then an identical policy will automatically take effect, with the following language added: "Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing." *Id.* at F1-F2.

The school district adopted the Football Policy pursuant to a District Court order in the present litigation. *See* JA 32 (Interim Order, May 10, 1995); Tr. 8/4/95 at 12, 48; JA 42 (Interim Order Pertaining to Prayer at Football Games, Aug. 17, 1995). The school district initially adopted an "invocation-only" policy in accordance with the District Court's directive

and the governing Fifth Circuit precedent which allows for a prayer-only policy. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993). JA 99-101. *Jones v. Clear Creek* upheld a policy permitting nonsectarian, non-proselytizing, student-initiated, student-led invocations at graduation ceremonies. *Id.* Thus, under *Jones v. Clear Creek*, a school district may adopt an "invocation-only" policy that permits students to vote to have a student-led invocation.

Shortly thereafter, however, the school district revised and expanded its policy to the current Football Policy, which permits students to deliver *both* "invocations" and "messages." Pet. App. at F1; JA 103-05. This current Football Policy was reviewed in the courts below, *see infra* pp. 11-12, and is now before this Court.

Respondents - plaintiffs in the District Court - are two parents and four students, all suing pseudonymously. JA 43-44. When the complaint was filed in April of 1995, the students attended schools in Santa Fe Independent School District. JA 1, 44.[2] Respondents brought suit under 42 U.S.C. §1983 challenging various incidents and practices in the public schools that were alleged to violate the Establishment Clause of the First Amendment. JA 15-27 (Complaint).

[2]At that time, one of the plaintiffs was a high school student and an adult, JA 44 (Stipulations), who presumably has since graduated. One of the minor plaintiffs was in seventh grade in 1993, JA 57, and presumably has also graduated. Another of the minor plaintiffs was in third grade in May of 1994, JA 59, and is now presumably in ninth grade. The final minor plaintiff was in third grade in the 1994-95 school year, *see* JA 60; Tr. 7/25/96 at 79-80, 183-84, and is now presumably in eighth grade.

Among the matters respondents challenged in their complaint was Santa Fe's allowance of student-led prayers at football games. JA 24. Respondents broadly requested injunctive relief against "the religious acts, customs, policies, and practices set forth" in the complaint. JA 25.[3]

In addition, respondents challenged Santa Fe's allowance of prayer at graduation ceremonies. JA 19-20. Although Santa Fe's commencement policy is not before this Court, the conditions imposed by the District Court on the commencement policy were later incorporated into its order governing Santa Fe's football policy. JA 42. Respondents sought immediate relief with respect to the upcoming commencement exercises. In light of the approaching graduation date, the District Court promptly held a hearing on respondents' motion for temporary injunctive relief. Dkt. 3, 6. The District Court then issued an Interim Order, JA 28 (dkt. 4), allowing student invocations based on the *Jones v. Clear Creek* model.

In particular, the District Court allowed Santa Fe to permit a "non-denominational," "non-proselytizing" "invocation and/or benediction" at the upcoming (1995) graduation ceremony. JA 31-32. The District Court specifically required that the students would first determine, by secret ballot held outside business hours, which student would speak as part of

[3]The complaint also attacked certain specific incidents of alleged misconduct by school officials. JA 21-24. The District Court concluded after trial that Santa Fe had already taken appropriate remedial steps regarding these incidents and that the respondents had demonstrated neither compensable injury nor legal liability on the part of Santa Fe. Pet. App. at D14, D15, D17. The Fifth Circuit affirmed the denial of monetary damages, 168 F.3d at 824, and respondents did not cross-petition for review in this Court.

the ceremonies. The District Court also specified that the students would have exclusive responsibility for the "mechanics of the election," and no campaigning would be allowed on school property. Next, the Court ordered that Santa Fe would have no "substantive input into this process whatsoever" and limited the school's involvement to "maintain[ing] order, and to provid[ing] for the reasonable safety and security of the proceedings." Finally, the District Court ordered that the selected students would prepare the text themselves and the school district would have no power of scrutiny or pre-approval over the texts. JA 31-32.

The District Court further ordered Santa Fe to

> establish or clarify existing policies to deal with either banning all prayer, or firmly establishing reasonable guidelines to allow nonsectarian and non-proselytizing prayer at all relevant school functions.

JA 32.[4]

At that time, Santa Fe had no formal policy specifically addressing prayers at football games. The practice had been for a "student council chaplain" to say a prayer over the public address system before varsity home football games. JA 64.

[4]The District Court repeatedly expressed its discomfort with the content limitations on student speech entailed in the "nonsectarian, non-proselytizing" requirement, but declared itself bound by Fifth Circuit precedent, namely, *Jones v. Clear Creek*. *See* Tr. 8/4/95 at 3-5; Tr. 11/3/95 at 11-12.

At a subsequent hearing on August 4, 1995, the District Court addressed the particular question of prayers at football games. Tr. 8/4/95. The District Court directed the parties to

> submit to me a joint proposed order to allow a *Jones* sanctioned type order before football games. . . . I want an order that will allow a *Jones* type -- in other words, non-proselytizing/nonsectarian prayer to solemnize and dignify the football game. And let me have that within ten days.

Id. at 48.[5]

On August 17, 1995, the District Court accordingly entered an Interim Order Pertaining to Prayer at Football Games. JA 42. This order incorporated the key elements of the District Court's previous order regarding commencement exercises. The order provided in pertinent part as follows:

> It is hereby ORDERED:
>
> The District's school board may permit the students at the District's high school to vote to include a pre-game prayer at varsity home football games and to select a student volunteer to deliver the prayer. All high school students may participate in the selection process if they so choose; however, the selection procedures previously outlined by the Court in its May 10, 1995 order concerning prayer at graduation must be followed. The pre-game

[5]The District Court further directed that "by October the 13th, the defendant [Santa Fe] will finalize a unified First Amendment religion expression policy addressing all issues . . . set out in this case." Tr. 8/4/95 at 56.

> prayer delivered by the volunteer student must be nonsectarian and nonproselytizing. *See Jones v. Clear Creek Indep. School Dist.*, 97[7] F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2950 (1993).

JA 42.

In response to this order, Santa Fe initially adopted a *Jones v. Clear Creek*-type policy governing "Prayer at Football Games." JA 99-101. Santa Fe's interim policy - allowing student-led, student-initiated prayer, but specifying that the selected student deliver an invocation - complied with the District Court's direction (at least in its "back-up" form).[6]

Nonetheless, Santa Fe was not satisfied with a football policy that limited student speech to an "invocation." As a result, Santa Fe adopted a new policy, entitled "Pre-Game Ceremonies at Football Games," to permit students to deliver speeches that need not be in any way religious. JA 104 ("brief invocation and/or message," "statement or invocation"). This policy was adopted in October of 1995. *See Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 812 (5th Cir. 1999); dkt. 20 at 14 n.5; Tr. 11/3/95 at 11. This is the current Football Policy, *see* Pet. App. at F1-F2, which is at issue before this Court.

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[6]Employing the model used in its new graduation policy, Tr. 8/4/95 at 5-6, Santa Fe adopted a "back-up policy" approach. Under this approach, the policy was set forth without the problematic "nonsectarian, nonproselytizing" restrictions on student speech; however, in the event a court invalidated that policy, a back-up policy containing the "nonsectarian, nonproselytizing" requirement would automatically take effect. JA 100-01.

Under the current Football Policy, Santa Fe students have sole authority over pre-game messages. Each spring, Santa Fe students vote, first, "whether such a statement or invocation will be part of the pre-game ceremonies." Pet. App. at F1. If the vote is affirmative, any student can volunteer to deliver the "statement or invocation." *Id.* Students then vote, in a second election, to select which student, from the list of volunteers, will give the "statement or invocation." *Id.* At that point,

> [t]he student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

Id. As with the predecessor policy, the new Football Policy included a back-up provision. *Id.* at F1-F2.

There is no record evidence concerning the actual operation of the policy, the results of any student votes, or the content of any messages or invocations given at football games under the current Football Policy at issue here. *See* 168 F.3d at 810 n.3.[7] Nonetheless, the Football Policy, on its face, makes clear that decisions whether to have a student speaker and the content of any student messages or invocations rest with the students.[8] In addition, further insights about the operation of

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[7]The stipulations contained in the Joint Appendix, JA 65-66 (Stipulations 129-31), refer to events predating the October 1995 Football Policy and relate instead to the *Jones v. Clear Creek*-type pre-game football policy that was only in effect from August to October 1995.

[8]The school district has no control over the content of the student speaker's "message and/or invocation." *See* JA 32 (Interim Order of May

(continued...)

the current policy come from the District Court's orders, with which the policy was designed to comply.

When the policy is read in conjunction with the District Court's orders, the following aspects of its operation become clear, JA 31-32, 42, 104-05:

- students first determine, by secret ballot held outside business hours, whether or not to include a student speaker as part of the ceremonies, JA 31;

- if the vote is in favor of having a student speaker, the students vote again, by secret ballot held outside business hours, to select who will speak at the ceremonies, JA 104;

- students have exclusive responsibility for the "mechanics of the election," with Santa Fe providing

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[8](...continued)
10, 1995); JA 42 (order of August 17, 1995 incorporating Interim Order of May 10, 1995); Tr. 5/10/96 at 9 (District Court: "the kids can use anybody they want, to say anything they want"). Indeed, Santa Fe has consistently maintained that it has ceded all content control to the student speaker. *See, e.g.*, Defendants' Motion for Summary Judgment (dkt. 20) at 14 ("the policy prevents school officials from dictating the content of any student statement or prayer"); Brief of Appellant at 21 (policy "allows *any* statement, message, or prayer that achieves the goal of the policy"); Reply Brief of Appellant/Cross-Appellee Santa Fe Independent School District at 8 ("The pre-game ceremony policy removes any school officials from the decisions of whether a message will be given, whether that message will be secular or prayerful, or what the actual content of the message or invocation will be"); Pet. at 18 (the pre-game policy "prohibits school officials from controlling the content of student speech if the students choose to take advantage of the opportunity offered").

no "substantive input into this process whatsoever," JA 31;

- school officials' involvement is limited to "maintain[ing] order, and to provid[ing] for the reasonable safety and security of the proceedings," JA 31-32;

- no campaigning is allowed on school property, JA 31;

- any student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy, JA 104;

- the school district has no power of scrutiny or pre-approval of the student speakers' texts, JA 32.

With no record evidence of the current policy's application, the District Court addressed the facial constitutionality of the current Football Policy in its ruling on summary judgment. Pet. App. at E5. *See also id.* at E13 n.13 (recognizing that respondents retain the right to challenge the policy, as applied, in a separate lawsuit). The court held that the Football Policy as written was unconstitutional, but that the "back-up" policy containing the "nonsectarian, non-proselytizing" requirement passed constitutional muster under the Establishment Clause. Pet. App. at E11-12. The District Court subsequently "adopted" its summary judgment ruling into its final order and entered final judgment. Pet. App. at D2, D19.

The parties filed cross-appeals. JA 11. A divided panel of the Fifth Circuit held the Football Policy unconstitutional both as written and in its "back-up" version. 168 F.3d at 822-23. The Fifth Circuit denied rehearing and, over seven dissenting votes, denied rehearing en banc. Pet. App. at C1. This Court then granted certiorari limited to the following question: "Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause."

SUMMARY OF ARGUMENT

"[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality) (emphasis in original). Santa Fe's Football Policy simply permits private speech by students.

Respondents bring a facial challenge to the Football Policy. That challenge cannot succeed absent a showing that under "no set of circumstances" the policy would pass constitutional muster. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Respondents cannot make such a showing.

As a neutral policy that permits secular or religious speech only as a consequence of the independent, intervening decisions of individual students, the Football Policy clearly satisfies Establishment Clause analysis. This Court has repeatedly held that neutrality and deference to private decisionmakers are key elements of a constitutionally permissible program. Neutrality

ensures that the government neither favors nor disfavors religion, while deference to private choice ensures that government neither establishes a religious view itself nor suppresses the religious freedom of private citizens.

Pursuit of this middle course - fostering private liberty while maintaining governmental neutrality - characterizes numerous decisions of this Court. *E.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981) (neutral accommodation of college student speech); *Mueller v. Allen*, 463 U.S. 388 (1983) (neutral tax deduction for education expenses); *Witters v. Washington Dep't. of Servs. for the Blind*, 474 U.S. 481 (1986) (neutral provision of educational grants); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (neutral protection for high school student clubs); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (neutral access to school facilities); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (neutral provision of services to disabled students); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (neutral access to student fees); *Agostini v. Felton*, 521 U.S. 203 (1997) (neutral provision of remedial education).

This "middle course" properly respects the twin guarantees of the Establishment and Free Exercise Clauses of the First Amendment. The Football Policy embraces this "middle course" and easily satisfies the various tests this Court has employed in its Establishment Clause analysis.

The Football Policy satisfies the purpose, effect, and entanglement inquiries of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Football Policy reflects a number of legitimate secular purposes. It was adopted in response to a court order.

It fosters the free expression of private persons, a purpose this Court approved in *Widmar*. And it serves a number of other explicitly stated secular purposes as well - solemnizing sporting events, promoting good sportsmanship and student safety, and establishing an appropriate environment for competition. Pet. App. at F1.

The primary effect of the Football Policy is to achieve the secular purposes identified above. Any religious speech that takes place under the policy will result only from the independent, intervening choices of students and ultimately the individual student speaker. Had the school district desired that students offer only invocations, it simply could have followed the District Court's direction to that effect under governing Fifth Circuit precedent. Instead, the school district chose a broader, neutral course in which students could present a message or invocation.

Santa Fe's Football Policy is the antithesis of excessive entanglement. By embracing a "hands-off" approach, the school district avoided any role as censor or monitor of religious or secular student speech.

Under the "endorsement" test, it is clear that the reasonable, informed observer would perceive no improper endorsement of religion. Any religious speech a student utters at a pre-game ceremony will result from that student's private choice, not from governmental intervention. Indeed, the students will have been involved in the very process of deciding, first, whether there would be a pre-game speech at all, and second, which volunteer speaker would be chosen to compose and deliver a message or invocation. These students

therefore will be personally aware of the neutrality of the policy and the student-initiated, student-composed nature of any speech delivered.

Finally, there is no unconstitutional government "coercion" here. Unlike *Lee v. Weisman*, 505 U.S. 577 (1992), where school officials decided that there would be a prayer, who would give the prayer, and what its contents would be, *id.* at 587-88, Santa Fe exercises no control over whether there would be a message or invocation, who would deliver it, and what its contents would be. Pet. App. at F1. These key features of student choice and neutrality preclude any state coercion. While some students may object to hearing a secular or religious message they disagree with, the Establishment Clause creates no affirmative right to silence student speech. Indeed, cases like *Rosenberger, Mergens*, and *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969), presuppose that students will encounter speech from classmates with which they may not agree.

Respondents' contrary position - that allowing student speech violates the Establishment Clause because that speech might be religious - is meritless. Furthermore, adoption of respondents' contention would impose an affirmative duty on school officials to censor student *religious* speech in contexts where student *secular* speech is allowed. Such censorship would raise a host of constitutional difficulties under the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment.

ARGUMENT

I. THIS CASE PRESENTS A FACIAL CHALLENGE TO SANTA FE'S POLICY PERMITTING STUDENT SPEECH AT FOOTBALL GAMES.

The Football Policy at issue here was enacted during the pendency of the litigation and in response to court orders mandating the parameters of that policy. Respondents presented no evidence concerning the actual operation of the Football Policy. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 810 n.3 (5th Cir. 1999) ("the record contains no examples of the football game prayers"). Therefore, this case presents only a facial challenge to the Football Policy. *See Bowen v. Kendrick*, 487 U.S. 589, 600 (1988) (explaining that in *Edwards v. Aguillard*, 482 U.S. 578, 581 n.1 (1987), "it was clear that only a facial challenge could have been considered, as the Act had not yet been implemented"). *See also* Pet. App. at E13 n.13 (District Court noted in its final order that respondents remain free to challenge the school district's policies, as applied, in a separate lawsuit).

"A facial challenge" to a statute, ordinance, or policy "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act [or policy] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "It has not been the Court's practice, in considering facial challenges to statutes . . . , to strike them down in anticipation that particular applications may result in unconstitutional [government actions]." *Bowen v. Kendrick*, 487 U.S. at 612 (quoting *Roemer v. Board of Public Works*, 426 U.S. 736, 761 (1976) (plurality)).

For respondents to prevail on their facial challenge, they would have to show that Santa Fe's Football Policy allowing "a statement or invocation" would be unconstitutional even if, for example, the student body always voted *not* to have any student message, or even if on each occasion the student speaker simply chose to deliver a secular message, such as a tribute to Walter Payton. Santa Fe's Football Policy cannot be invalidated on the basis of some "possibility or even likelihood" of an unconstitutional application. *Bowen*, 487 U.S. at 613. *Accord id.* at 623 (O'Connor, J., concurring) (facial challenge must be rejected where statute "need not result in constitutional violations, despite an undeniably greater risk than is present in [other contexts]"). "The fact that the [policy] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Salerno*, 481 U.S. at 745.

As established herein, respondents "have failed to shoulder their heavy burden to demonstrate that the [policy] is 'facially' unconstitutional." *Id.* On the contrary, the Santa Fe Football Policy easily passes facial constitutional muster.

II. THE SANTA FE FOOTBALL POLICY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A. As a Neutral Policy that Permits Secular or Religious Speech Only as a Consequence of the Independent, Intervening Choices of Individual Students, the Santa Fe Football Policy Does Not Violate the Establishment Clause.

The Santa Fe Football Policy combines two features which together ensure that the program does not run afoul of the Establishment Clause. First, the Football Policy is neutral as between secular and religious speech. By its express terms, the Football Policy "permit[s] students to deliver a brief invocation and/or message." The Football Policy does not favor invocations over messages or vice-versa. The choice is left to the student.

Second, and equally important, the Football Policy does not permit any religious speech to take place absent the independent, intervening choices of individual students. Indeed, the Football Policy permits student-led, student-initiated, secular or religious speech only after a series of independent student choices. Initially, students must choose whether to have a speaker. (Students do *not* vote whether to have a prayer.) If the students vote to have such a speaker, individual students must then choose to volunteer to deliver the pre-game speech. Next, the student body must choose by vote which student volunteer will speak. Finally, that individual student speaker must choose what message to give. Religious speech will occur, if at all, only as a result of multiple independent, intervening decisions of students.

This Court's religion cases uniformly have stressed the importance of government neutrality toward religion. The neutrality principle has played a role in almost every effort to interpret the Establishment Clause and to reconcile it with the Free Exercise and Free Speech Clauses of the First Amendment. *See, e.g., Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Agostini v. Felton*, 521 U.S. 203 (1997).

More recently, in the context of student speech, this Court has emphasized that a policy of "neutrality" in no way requires or justifies the exclusion of religious speakers or religious topics. A neutral policy that puts religious speech on an equal footing with other speech does not violate the Establishment Clause. Indeed, this Court repeatedly has held that a public school that opens its facilities to secular groups and speakers, not only may, but must, offer those facilities to religious groups and speakers on an equal basis. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). By treating secular and religious speech equally, the government ensures that "the message is one of neutrality rather than endorsement." *Mergens*, 496 U.S. at 248 (plurality).

In addition to neutrality, this Court consistently has emphasized the distinction between direct government involvement in religious speech and government toleration of religious expression that results from the independent, intervening choices of individuals. Speech that is student-led and student-initiated results from the individual speaker's choices. The message does not flow from the government. As *Mergens* recognized, "there is a crucial distinction between

government speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." 496 U.S. at 250 (plurality) (emphasis in original).

This Court also has recognized the importance of independent, intervening choices in other Establishment Clause contexts. In *Mueller v. Allen*, 463 U.S. 388 (1983), for example, this Court upheld Minnesota's tax deduction for educational expenses, including those incurred at sectarian schools, with the observation that "public funds become available only as a result of numerous, private choices of individual parents of school-age children." *Id.* at 463. Likewise, Justice Marshall, writing for a unanimous Court in *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), emphasized that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488; *see also id.* at 490-91 (Powell, J., concurring) (underscoring this point); *id.* at 493 (O'Connor, J., concurring in part and concurring in judgment) (same); *see also Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993).

This Court returned to both these themes - neutrality and the importance of intervening, individual choice - in *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995). First, the Court observed that "a significant factor in upholding governmental programs in the face of an Establishment Clause attack is their neutrality towards religion." *Id.* at 839. In addition, the Court highlighted the critical "distinction between the University's own favored

message and the private speech of students." *Id.* at 834. The majority then applied these principles to conclude that a neutral policy of reimbursing the printing costs of student magazines, whose content was entirely the product of student decisions, did not violate the Establishment Clause.

Although the dissent disagreed with the application of these principles in a context that arguably involved direct aid to religious institutions, no member of the Court quarreled with the importance of these two principles. The dissent recognized the importance of neutrality or "evenhandedness." *Id.* at 877-79 (Souter, J., dissenting). Likewise, the dissent recognized the emphasis prior cases had placed on the fact that any attenuated religious effect was "'the result of the genuinely independent and private choices of aid recipients.'" *Id.* at 880 (Souter, J., dissenting) (quoting *Witters*, 474 U.S. at 487). The dissent also emphasized that there must be a "third party standing between the government and the ultimate religious beneficiary to break the circuit by its independent discretion." 515 U.S. at 886 (Souter, J., dissenting).

The Santa Fe Football Policy satisfies these key principles. The Football Policy, of course, involves no direct aid and so presents a much easier case than *Rosenberger*. This is a case of speech without aid. Nonetheless, even applying the standard of the dissent in *Rosenberger*, the "independent discretion" of the student speaker in deciding whether to give a message or invocation clearly suffices to "break the circuit" between the government and any religious content of the student speech. In addition, the Football Policy's facial neutrality underscores that the individual student's speech is the result of student choice, not school direction. Pet. App. at F1.

Under these circumstances, especially in the context of a pre-implementation facial challenge, the Santa Fe Football Policy does not run afoul of the Establishment Clause. What is more, the neutrality and important role of individual choice that characterize the Football Policy make clear that the policy passes muster under the various tests this Court has employed to guide its Establishment Clause jurisprudence.

B. As a Neutral Policy that Permits Secular or Religious Speech Only as a Consequence of the Independent, Intervening Choices of Individual Students, the Santa Fe Football Policy Passes the *Lemon* Test.

The neutrality and the important role of independent, intervening choices that characterize Santa Fe's Football Policy ensure that it passes all three prongs of the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The familiar *Lemon* test imposes three requirements:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion."

Id. at 612-13 (citation omitted). This Court has not applied *Lemon* with regularity and has most recently suggested that the entanglement test is best understood "as an aspect of the inquiry

into the statute's effect." *Agostini*, 521 U.S. at 233.[9] In any event, the *Lemon* test poses no obstacle to Santa Fe's Football Policy.

1. The Santa Fe Football Policy Has an Explicit Secular Purpose.

The Football Policy serves the secular purpose of encouraging and accommodating student speech. The desire of an educational institution to permit student speech itself reflects a constitutionally sufficient secular purpose. *Widmar v. Vincent*, 454 U.S. 263, 271 & n.10 (1981). Formulation of the policy also served the pressing secular need to comply with court orders directing the adoption of such a policy. Here, Santa Fe went beyond the requirements of the District Court order permitting a prayer-only policy by ultimately adopting the policy at issue here, which allows students to deliver a "message and/or invocation." By going beyond the demands of the District Court order and Fifth Circuit precedent and expressly including secular speech, Santa Fe furthered indisputably legitimate secular purposes.

The policy's facial neutrality, permitting both religious invocations and secular messages, further guarantees a secular purpose. As this Court has noted, "*Lemon*'s 'purpose'

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[9]At times, this Court has referred to the factors enumerated in *Lemon* as "no more than helpful signposts." *Hunt v. McNair*, 413 U.S. 734, 741 (1973). In other cases, this Court's analysis has ignored *Lemon* and its three-prong test entirely. *See, e.g., Rosenberger; Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *but see Lamb's Chapel*, 508 U.S. at 395 n.7 ("there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled").

requirement aims at preventing the relevant government decisionmaker . . . from abandoning neutrality." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

The Football Policy also serves the more specific "legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society," as well as fostering an atmosphere of sportsmanship at football games. *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring). On its face, the Football Policy articulates the secular purpose for student speech and, by extension, for the policy as a whole: "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Pet. App. at F1.

Santa Fe's stated secular purposes ensure that it does not run afoul of the first prong of *Lemon*. This Court has stressed its "reluctance to attribute unconstitutional motives to states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). What is more, a challenged provision violates the "purpose" prong of *Lemon* "only if it is motivated wholly by an impermissible purpose." *Bowen v. Kendrick*, 487 U.S. at 602 (and cases cited). Indeed, the Court repeatedly has found a secular purpose even for programs that failed to comply with another aspect of *Lemon*. *See, e.g., Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Lemon*, 403 U.S. at 613.

The Football Policy does not direct any student to offer an invocation. Any religious speech, if it occurs at all, will take place only as a result of the multiple independent, intervening choices of individual students. *Supra* pp. 8-11. This crucial fact underscores the secular purpose of the policy. The best proof of these abiding secular purposes is that the Football Policy's goals would be satisfied even if not a single student chooses to deliver a religious invocation. If every student message is secular, the policy can still achieve its stated goals "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Pet. App. at F1.

Certainly, the express inclusion of invocations among the permissible forms of student speech does not cast any doubt on the Football Policy's secular purposes. To the contrary, the Football Policy's express neutrality ensures a secular purpose. No rule of construction can convert the policy's express neutrality into express favoritism.

The Football Policy's inclusion of invocations among the permissible forms of student speech reflects the same secular purpose as the express inclusion of "religious" content among the forbidden grounds for discriminating against student speech in the Equal Access Act. *See* 20 U.S.C. § 4071(a) (forbidding the denial of equal access "on the basis of the religious, political, philosophical, or other content of the speech"). The express inclusion of religious speech in the statute did not trouble the Court in *Mergens*. Moreover, the conclusion in *Mergens* applies with full force to the Santa Fe Football Policy: "Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose

was not to "'endorse or disapprove of religion.'" *Mergens*, 496 U.S. at 249 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985), quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). Likewise, this Court upheld the Adolescent Family Life Act against a facial challenge in *Bowen v. Kendrick*, 487 U.S. 589 (1988), despite four separate express references in the statute to the role of religious organizations in addressing the problems associated with adolescent sexuality. *See id.* at 606-07.

Nothing in *Wallace v. Jaffree*, 472 U.S. 38 (1985), undermines the Football Policy's secular purpose. Indeed, the Football Policy is in many ways the converse of *Wallace*. In *Wallace*, this Court struck down an Alabama statute that layered a moment of silence "for meditation or voluntary prayer" on top of an existing statute providing for a moment of silence "for meditation." 472 U.S. at 59. Although the order of the two statutes was not dispositive,[10] the Court concluded that the addition of voluntary prayer to an existing baseline of meditation reflected a "legislative intent to return prayer to the

[10]*Wallace* involved the unusual situation in which the "unrebutted evidence" pointed to a wholly religious purpose, 472 U.S. at 58, and in defending the statute, Alabama "conceded in the courts below that the purpose of the statute was to make prayer part of daily classroom activity," *id.* at 77-78 (O'Connor, J., concurring in judgment). The addition of an express reference to prayer when an existing statute already permitted a moment of silence for meditation was only one piece of evidence. Indeed, Justice O'Connor specifically noted that the decision in *Wallace* would not invalidate the 1954 congressional amendment expressly adding "under God" to the pre-existing text of the Pledge of Allegiance. *See id.* at 78 n.5 (O'Connor, J., concurring in judgment). "Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives." *Id.* at 73 (O'Connor, J., concurring in judgment).

public schools," which was "quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday." *Id.*

Here, by contrast, the relevant baseline was not a policy that permitted any and all messages at football games, implicitly including invocations. Instead, the relevant baseline was a policy expressly accommodating prayer, and prayer alone, at football games. As explained above, the District Court ordered the school district to formulate a football game policy consistent with Fifth Circuit precedent. That precedent allows a school district to have a policy permitting only prayer.[11] The District Court created a baseline of an explicit prayer-only policy. Despite this clear precedent, and despite the District Court's order to formulate a policy consistent with Fifth Circuit precedent, Santa Fe eventually settled on a policy that expressly gives the student speaker a choice to deliver either an invocation or message. Santa Fe decided to permit not just religious speech, but secular speech - not just invocations,

[11]Governing Fifth Circuit precedent clearly gave Santa Fe the option of adopting an invocation-only policy. In *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), on remand for reconsideration in light of this Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992), the Fifth Circuit upheld an invocation-only policy for commencement ceremonies. Under the *Jones v. Clear Creek* policy, students decided whether or not to have an individual student deliver a nonsectarian, nonproselytizing invocation at the commencement exercise. *Jones v. Clear Creek*, 977 F.2d at 964-65. The Fifth Circuit approved this policy without indicating that the policy created any constitutional difficulties by limiting students to invocations - as opposed to invocations or messages. Accordingly, if Santa Fe had wanted to establish a policy giving students only the option of delivering invocations, Fifth Circuit precedent gave them a green light.

but messages. Under these circumstances, the Football Policy clearly reflects a secular purpose.

2. The Santa Fe Football Policy's Neutrality and the Critical Intervening Roles of Students Ensure that the Policy Does Not Have the Primary Effect of Advancing Religion.

The Santa Fe Football Policy's neutrality and the important role of independent, intervening student decisions prevent the program from having the primary effect of advancing religion. Instead, the program has the primary effect of advancing the neutral, secular goals that are achieved regardless of whether students choose to deliver a message or an invocation - namely, accommodation of student speech, solemnization of public occasions, and promotion of sportsmanship. In *Witters*, for example, empowering handicapped students to choose a suitable education - secular or sectarian - ensured that the policy's primary effect was promoting vocational education for handicapped students. Any benefit to the sectarian or secular institutions chosen by individual students was the secondary result brought about by the independent choices of private persons. As Justice O'Connor explained for a plurality of this Court in *Mergens*,

> there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. . . . The proposition that schools do not endorse everything they fail to censor is not complicated.

496 U.S. at 250 (rejecting "primary effect" challenge) (emphasis in original; citations omitted).

In the present case, as in *Mergens*, any religious or secular message is chosen and delivered by the student speaker, not a government official. The student speaker has unreviewable discretion to compose a message from virtually any religious or secular perspective, and any student can volunteer. Hence, the "broad spectrum" of potential messages, *cf. id.* at 252, supplies an "important index of secular effect," *id.* (quoting *Widmar*, 454 U.S. at 274). In addition, because this is a facial challenge, there is no evidence of any unconstitutional primary effect.

Here, if the school district's primary goal were to promote prayer, it would have been content to direct students to vote only on the question whether to offer prayers, as Fifth Circuit precedent allows. The District Court's invitation to follow this course provided the perfect opportunity for the school district to adopt a "prayer-only" policy. *Supra* note 11. Instead, Santa Fe empowered students to choose whether to have any speech at all, and let the individual student speakers decide whether to deliver a message or invocation. Empowering students in this fashion is entirely consistent with accommodating student speech and promoting sportsmanship, but not with promoting prayer.

The analysis in *Mergens* likewise refutes any notion that the Football Policy has the impermissible primary effect of advancing religion. The same safeguards emphasized in

Mergens are present here. First and foremost, the critical role students play in decisions whether and how to speak ensures that students "understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U.S. at 250 (plurality). In addition, like the programs authorized by the Equal Access Act, any student speech that occurs here would take place without the involvement of teachers and during football games, a decidedly non-instructional time. As *Mergens* recognized, "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." *Id.* at 251 (plurality). Finally, the program's neutrality plays an important role in maintaining a permissible primary effect. As in *Mergens*, "a school that permits a student-initiated and student-led religious [speech], just as it permits any other student [speech], does not convey a message of state approval or endorsement of the particular religion." *Id.* at 252 (plurality); *accord Rosenberger*, 515 U.S. at 841-42.

This Court's recent analysis of the effects test in *Agostini v. Felton*, 521 U.S. 203 (1997), reinforces the conclusion that the Santa Fe Football Policy does not have the primary effect of advancing religion. In *Agostini*, this Court identified the "three primary criteria we currently use to evaluate whether government aid has the primary effect of advancing religion." *Id.* at 234. The Court upheld the Title I program at issue because "it does not result in government indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* The Santa Fe Football Policy likewise does not raise any of these concerns. By relinquishing to students the power to decide whether and how to engage in speech,

Santa Fe removes itself from any position to indoctrinate religious beliefs.

Similarly, the policy does not define speakers by reference to religion or create any incentive for the individual speaker to choose a religious theme over a secular one. It is perhaps imaginable that a school could administer such a policy in a manner that would create incentives to choose religious topics. But that is particularly unlikely here in light of the school district's choice of a neutral speech policy over the invocation-only policy permitted under Fifth Circuit precedent and authorized by the District Court.

In any event, the remote possibility that someone could pervert a facially neutral policy to favor religion is not a fit consideration for a pre-implementation facial challenge. *Supra* § I. As this Court has noted on a number of occasions, "public employees will not be presumed to inculcate religion." *Agostini*, 521 U.S. at 225; *accord Zobrest*, 503 U.S. at 13; *Board of Educ. v. Allen*, 392 U.S. 236, 245 (1968) ("Absent evidence, we cannot assume that school authorities . . . will not honestly discharge their duties under the law"). Finally, as demonstrated in the following section, the Football Policy avoids excessive entanglement, the final factor identified in *Agostini*.

3. The Santa Fe Football Policy Avoids, Rather Than Engenders, Excessive Entanglement.

Whether properly analyzed as a stand-alone factor or as part of the effects test, the "entanglement" inquiry poses no constitutional obstacle to the Santa Fe Football Policy. Indeed,

the policy's facial neutrality and its decision to leave the choice of message or invocation up to the individual student is the antithesis of entanglement.

By adopting a "hands-off" approach and leaving it to the student speaker to select the message (and to the student body both to select the speaker and to decide whether even to have a message at football games in the first place), Santa Fe has removed itself several steps from any potential religious message. By deliberate policy design, there is no monitoring of religion or censoring of religious speech that could trigger entanglement concerns. *See Mergens*, 496 U.S. at 253 (plurality) ("school officials may not promote, lead, or participate" in students' religious speech, and "custodial oversight . . . does not impermissibly entangle government in . . . religious activities"). As in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), it "cannot be seriously contended that [the challenged enactment] impermissibly entangles church and state; the [enactment] effectuates a more complete separation of the two and avoids . . . intrusive inquiry into religious belief," *id.* at 339. Indeed, the rule respondents urge - mandatory censorship of student religious messages - would create precisely the entanglement concerns the present policy avoids. *See infra* § III(C).

In this regard, the Santa Fe Football Policy has the same virtues as the program upheld in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). In that case, a tax exemption for religious organizations along with other charitable organizations avoided entanglement concerns. The contrary policy would have forced tax authorities into innumerable decisions as to whether an organization qualified as "religious" and then obligated them to

monitor organizations to ensure that the resulting classifications were not circumvented. *See id.* at 674. Both are roles for which government authorities are uniquely ill-suited. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981).

Likewise, in the specific context of student speech, this Court has recognized that neutral policies serve to avoid entanglement problems. *See Rosenberger*, 515 U.S. at 844-45; *Mergens*, 486 U.S. at 253 (plurality); *Widmar*, 454 U.S. at 269-70 n.6, 272 & n.11. As *Mergens* aptly summarized, "a denial of equal access might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech." 486 U.S. at 253 (plurality). Such "official censorship would be far more inconsistent with the Establishment Clause's dictates than would government provision of [an opportunity for student speech] on a religion-blind basis." *Rosenberger*, 515 U.S. at 845; *see also County of Allegheny v. ACLU*, 492 U.S. 573, 677-78 (1989) (Kennedy, J., concurring in part and dissenting in part).[12]

In sum, the Santa Fe Football Policy's facial neutrality between messages and invocations, and the authority of students to make independent decisions, make clear that the policy survives all three prongs of the *Lemon* test. The policy serves secular purposes and has the primary effects of accommodating student speech, solemnizing public occasions,

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[12]Respondents bear a particularly heavy burden in establishing excessive entanglement in a facial challenge. When a program does not involve excessive entanglement "on its face," courts will not assume that bad faith in implementation will necessitate excessive monitoring. *See Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 660-61 (1980).

and fostering sportsmanship. Moreover, far from engendering excessive entanglement between church and state, the policy grants students freedom from government monitoring and censorship.

C. As a Neutral Policy that Permits Secular or Religious Speech Only as a Consequence of the Independent, Intervening Choices of Individual Students, the Santa Fe Football Policy Neither Endorses Religion Nor Coerces Religious Observances.

The neutrality and the role of individual students provide the keys to the Santa Fe Football Policy's compliance with *Lemon*. These same features also ensure that the policy does not run afoul of the other tests this Court has employed in applying the Establishment Clause. The facial neutrality of the program precludes any message of government endorsement of religion, and the choices exercised by students preclude government coercion. With these guarantees of neutrality and student choice, "there is no real likelihood that the speech in question is being either endorsed or coerced by the State." *Rosenberger*, 515 U.S. at 841-42. What is more, the fact that the speech occurs on the football field at night, rather than in the classroom during the school day, avoids coercion or endorsement. As noted above, "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." *Mergens*, 496 U.S. at 251.

1. The Santa Fe Football Policy Does Not Endorse Religion.

The question whether the government's actions impermissibly endorse religion is one yardstick this Court has employed in determining whether those actions have the impermissible primary purpose and effect of advancing religion. *See, e.g., Agostini*, 521 U.S. at 235; *Allegheny*, 492 U.S. at 592. Accordingly, Santa Fe's Policy does not endorse religion for the same reasons that it does not have the primary purpose and effect of advancing religion.[13]

In particular, the Football Policy involves student, rather than government, speech and is neutral between religious and secular speech. These factors preclude any government endorsement, or appearance of endorsement, of religion. Any religious speech that occurs under the policy will be "the result of [the student's] private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious activity." *Witters*, 474 U.S. at 493 (O'Connor, J., concurring); *accord Agostini*, 521 U.S. at 226 (noting that when religious activity occurs only because of independent, individual decisions it cannot be attributed to state decisionmaking); *Rosenberger*, 515 U.S. at 848 (O'Connor, J., concurring) (same); *Mueller v. Allen*, 463 U.S. 388, 399 (1983)

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[13] *See Agostini*, 521 U.S. at 235 (stating at the conclusion of its *Lemon* analysis,"[t]he same considerations . . . require us to conclude that this . . . program also cannot reasonably be viewed as an endorsement of religion"); *Mergens*, 496 U.S. at 252 (plurality) ("students should perceive no message of government endorsement of religion. Thus, we conclude that the Act does not . . . on its face . . . have the primary effect of advancing religion").

("no imprimatur of state approval" of religion where religious choice is made by private individuals).[14]

Although this Court has recognized that intervening, individual choices avoid endorsement problems in other contexts, *see, e.g., Witters*, 474 U.S. at 488-89, this is especially true when student speech is at issue. The "crucial distinction between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," applies with particular force to the question of endorsement. *Mergens*, 496 U.S. at 250 (plurality) (emphasis in original); *see also Lee v. Weisman*, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring) ("If the State had chosen its graduation day speaker according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State"). Here, Santa Fe employs secular criteria and leaves the choice of whether or not to have a message and decisions concerning its content to the student speaker. Pet. App. at F1. By providing an opportunity for student speech, the school "does not thereby endorse or promote any of the particular ideas aired." *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981).

Moreover, by specifying that a "statement" and "invocation" are both permissible options, "the State has not thereby encouraged prayer over other specified alternatives." *Wallace v. Jaffree*, 472 U.S. 38, 73 (1985) (O'Connor, J.,

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[14]"Indeed, we note that Congress specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion." *Mergens*, 496 U.S. at 250 (plurality).

concurring in judgment). As *Mergens* made clear, "secondary school students are mature enough and are likely to understand that a school does not endorse student speech that it merely permits on a nondiscriminatory basis." 486 U.S. at 250 (plurality). "The proposition that schools do not endorse everything they fail to censor is not difficult to understand." *Id.*

Indeed, that straightforward proposition is particularly easy to comprehend in the context of a football game. Unlike *Mergens*, in which most student speech targeted an audience consisting almost entirely of students, a football crowd will include a substantial number of parents, who are even more "likely to understand that a school does not endorse student speech that it permits on a nondiscriminatory basis," and can reinforce that message to their children. The mixed nature of the crowd also underscores how far removed a football game is from the classroom setting. The football field is a physically separate, open-air venue. As a result, "the fortuity of geography" and "the nature of the particular public space" substantially lessen the risks of endorsement. *Pinette*, 515 U.S. at 778 (O'Connor, J., concurring in part and concurring in judgment). Unlike the classroom setting in which students routinely hear speech directed by the school, students do not routinely receive instruction on the football field or in the stands, and have no preconception that the speech they are about to hear will be directed by the school.

To the contrary, the students in attendance will know to a moral certainty that the speech they are about to hear is private student speech, rather than speech directed and endorsed by the school. The students will know this because they will have participated in both the process of deciding whether to have a

speaker and the separate process of selecting a speaker. Participating in those processes will reinforce what is clear from the face of the policy: that the decisions whether to have a speaker, and which speaker to have, rest with students, not the school. Likewise, the decision whether the student speaker will offer an invocation or a secular message rests with that individual student, not the school. Any decision by a student speaker to offer an invocation stands several intervening, student-made decisions removed from the school. Having participated in the decisionmaking process themselves, the students cannot possibly view the school as endorsing the resulting student speech.

This same knowledge should be attributed to others in the crowd who have not participated in the selection process themselves. A program does not become unconstitutional because someone ignorant of its actual operation perceives an endorsement. "Private religious speech cannot be subject to veto by those who see favoritism where there is none." *Pinette*, 515 U.S. at 766 (plurality). "It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech] appears." *Id.* at 780 (O'Connor, J., concurring in part and concurring in judgment).[15] A reasonable observer, well-acquainted with the mechanics of the Santa Fe Football Policy and the context of the football game, would perceive student speech, not

[15]For this reason, an observer seeing only one student message of a religious character could not find endorsement in light of the neutrality of the program, the fact that the decision to offer an invocation was the student's, not the school's, and the fact that a student may have offered a secular message in the previous home game.

government endorsement. This is particularly true because speech, unlike the permanent, unattended display in *Pinette*, is uniquely associated with the speaker, as opposed to the forum. *See id.* at 786 (Souter, J., concurring) ("When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands").

Finally, the facial, pre-implementation nature of respondents' challenge has important implications for the endorsement test. This Court's precedents, new and old, recognize that it will not condemn a policy simply because of the possibility that it could be administered in bad faith to create an endorsement of religion. *See, e.g., Agostini*, 521 U.S. at 225; *Zorach v. Clauson*, 343 U.S. 306, 311 (1952). Accordingly, that possibility cannot provide a basis for striking down a policy on its face in a pre-implementation challenge. In addition, the facial posture of the case provides an opportunity for the Court to give guidance as to how the policy can be implemented to minimize constitutional concerns.

2. The Santa Fe Football Policy Does Not Coerce Participation in Religious Observances.

A neutral program that allows students to choose whether to engage in secular or religious speech does not result in impermissible government coercion. The Santa Fe Football Policy is distinguished by the important role that student choices play. The decisions whether to have a speaker, which speaker to have, and whether to deliver an invocation or speech

lie with students, not with the school. Such student choices are the antithesis of coercion.

In *Lee v. Weisman*, 505 U.S. 577 (1992), this Court concluded that a school-directed commencement prayer was coercive in violation of the Establishment Clause. However, the Santa Fe Football Policy distinguishes itself at every turn from the prayer policy struck down in *Lee*. First, in *Lee*, "[a] school official, the principal, decided that an invocation and a benediction should be given; that is a choice attributable to the State." 505 U.S. at 587. Here, by contrast, students decide, at the outset, whether or not students will speak at the next season's home football games. That choice is clearly attributable to the students. Next, in *Lee*, "[t]he principal chose the religious participant, . . . a rabbi, and that choice is also attributable to the State." *Id.* Here, by contrast, students pick the speaker from among a list of students who choose to volunteer. The school plays no role; the choice is attributable to the students. Moreover, in *Lee*, "[t]he State's role did not end with a decision to include a prayer and with the choice of a clergyman," *id.* at 588; instead, "the principal directed and controlled the content of the prayers," *id.* at 588. Here, by contrast, the individual student speaker decides whether to deliver an invocation or message and controls the content of the speech without regard to whether it is religious or secular. The school exercises no control over content, and so the content is attributable to the student, not the State.

These critical distinctions suffice to avoid the coercive effects of the school-directed prayer invalidated in *Lee*. The coercion in *Lee* resulted from the State directing a religious exercise with one hand, while forcing student attendance with

the other. The Court repeatedly observed that under the challenged program "State officials direct the performance of a formal religious exercise," "creating a state-sponsored and state-directed religious exercise in a public school." *Id.* at 586, 587. The state involvement in the prayer was critical to the Court's conclusion. *See id.; see also id.* at 630 n.8 (Souter, J., concurring). This Court has never found coercion when the State simply provided a neutral opportunity for religious and secular speech. *See, e.g., Rosenberger*, 515 U.S. at 841-42. Indeed, the *Lee* Court recognized that "the First Amendment does not allow the government to stifle [the offering of] prayers," even though the Constitution does not "permit the government to undertake that task for itself." 505 U.S. at 589.

The distinctions between *Lee* and this case do not end with the crucial difference between government prayer and private speech. The context of a home football game differs dramatically from that of a high school commencement in ways that further dissipate any coercion. The Court went out of its way in *Lee* to stress the unique compulsion present in a commencement, for which attendance and participation "are in a fair and real sense obligatory." *Id.* at 586. The Court described commencement as "one of life's most significant occasions" and "an event of singular importance to every student." *Id.* at 595, 598. The same cannot be said for a high school football game. Unlike a commencement that involves every member of the graduating class, football games are of no more than passing interest to many students. Moreover, while commencement is intimately related to - indeed the culmination of - the school's curriculum, football is decidedly extra-curricular.

Football games differ from commencements not only in these broad strokes, but also in the details. For example, during commencement exercises the graduating class generally sits together in a monolith that magnifies peer pressure and exaggerates the failure of a single student to stand. The crowd at football games, by contrast, is a random mix of students, parents, and the community at large. While students at commencement exercises generally must arrive on time and stay in their assigned places for the duration of the ceremony, students at football games remain free to arrive late, move about, and visit the concession stand or other facilities.[16] Collectively, these myriad differences between football games and commencements underscore the absence of any coercion in the Santa Fe Football Policy.

It is of course true that some members of the audience may disagree with the eventual message, if any, given before a football game. Indeed, disagreement will not likely be limited to the religious aspect, if any, of the messages. Fans of the visiting team, for example, may object strenuously to wishes for

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[16]To be sure, some students may have to attend football games by virtue of their participation in the band, as a cheerleader, or on the football team. This factor does not change the result here. First, such a fact-based, individualized objection lies outside the scope of this facial challenge and would instead properly belong in an "as applied" challenge, not to the Football Policy, but to the mandatory attendance requirement. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972). Second, and most important, the Establishment Clause does not license one person to silence or censor the speech of another student speaker on the basis of objection to the content or viewpoint of the student's message. *Infra* at p. 43. The key difference between *Lee* and the present case is that in *Lee* the objectionable speech came from the government itself, not from an individual student speaker whose decision to speak is the result of independent, intervening decisions of students.

the success of the home team. But this Court's precedents recognize that

> throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.

Lee, 505 U.S. at 598-99. "People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." *Id.* at 597.

Neither the Establishment Clause nor any other constitutional provision guarantees that one student will never hear another student say something to which the student objects. Indeed, cases like *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969), *Mergens*, *Pinette*, and *Lee v. ISKCON*, 505 U.S. 830 (1992), allowed freedom of speech despite the inevitable fact that some persons who have to be present may well object to the speaker's message. The possibility that some persons may unavoidably encounter religious speech cannot require affirmative silencing of private speakers without overruling these and countless other precedents.

The student choices and neutrality that characterize the Football Policy distinguish it from the state-directed prayers and coercive atmosphere of *Lee*. Indeed, these same factors ensure that the program complies with all the tests this Court has employed in evaluating claims under the Establishment Clause. What is more, the Santa Fe Football Policy neutrally

accommodates student speech in a way that avoids the myriad problems inherent in direct government involvement with speech and religion. By keeping the school several steps removed from the student speech, the school complies with the Establishment Clause and avoids potential conflicts with the remainder of the First Amendment. Far from violating the First Amendment, the Santa Fe Football Policy accommodates student speech and "follows the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

III. TO INVALIDATE THE MERE ALLOWANCE OF STUDENT SPEECH ON THE BASIS THAT THE STUDENT'S SPEECH COULD BE RELIGIOUS WOULD AFFIRMATIVELY CAUSE CONSTITUTIONAL DIFFICULTIES.

Santa Fe "has chosen to permit" student-initiated, student-delivered speech during pre-game ceremonies of home varsity football games. Pet. App. at F1. To strike that policy down would be to interpret the Establishment Clause as imposing an affirmative obligation on the states to *censor* religious speech where other speech is allowed. Such a rule runs counter to this Court's settled "equal access" jurisprudence. Indeed, such a mandatory censorship rule would raise grave constitutional difficulties under the First Amendment's Free Speech, Free Exercise, and Establishment Clauses. The consistent, bedrock principle derived from these various constitutional provisions is that government may not impose discriminatory burdens on

religious expression.[17] *See generally Rosenberger*, 515 U.S. at 844-45.

A. The Free Speech Clause

Religious speech is constitutionally protected speech. *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981). "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (plurality) (and cases cited).

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be *Hamlet* without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing . . . or even acts of worship.

Id. (citations omitted) (emphasis in original). The Free Speech Clause therefore generally precludes discrimination against religious speech. *Id.* at 761 (strict scrutiny applies where expression was rejected "precisely because its content was religious"). Indeed, such discrimination may well constitute

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[17]Petitioner does not contend that a school district is under any constitutional compulsion to allow a student pre-game message in the first place. Once the school extends such an opportunity to speak, however, constitutional considerations determine the legitimacy of any government control over the message. Here, the Establishment Clause and the Free Speech and Free Exercise Clauses all militate in the same direction, namely, noninterference by the government.

viewpoint discrimination, the most egregious form of content-based censorship. *Lamb's Chapel*, 508 U.S. at 394; *Rosenberger*, 515 U.S. at 832 ("discriminating against religious speech was discriminating on the basis of viewpoint").

Thus, as a general matter, for example, if a governmental agency allows a private speaker to offer a secular message of inspiration, it must allow the speaker to take a religious perspective as well.

B. The Free Exercise Clause

The Free Exercise Clause forbids discriminatory restrictions of religious expression. Such restrictions target speech *because it is religious* and thus strike at the very heart of the constitutional protection of religious freedom. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("The government may not . . . impose special disabilities on the basis of religious views or religious status" or ban acts "only because of the religious belief that they display").

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993). *See also McDaniel v. Paty*, 435 U.S. 618 (1978).

Respondents would in effect rewrite the Santa Fe Football Policy explicitly to forbid religious speech and only religious

speech. However, as this Court made clear in *Lukumi*, "the minimum requirement of neutrality is that a law not discriminate on its face." 508 U.S. at 533. The express discrimination envisioned by respondents raises the precise concerns identified in *Lukumi*.

C. The Establishment Clause

The Establishment Clause requires neutrality and forbids hostility toward religion. As this Court explained in *Everson*, the Establishment Clause requires the state to be "neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). The discriminatory suppression of *religious* speech "would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248. As in *McDaniel*, such a discriminatory "exclusion manifests patent hostility toward, not neutrality respecting religion, and, in sum, has a primary effect which inhibits religion," 435 U.S. at 636 (Brennan, J., concurring in judgment).

Moreover, discriminatory suppression of *religious* speech requires the censor to judge what is and is not religious speech. This creates additional constitutional problems:

> [School officials] would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. . . . There would also be a continuing

need to monitor group meetings to ensure compliance with the rule.

Widmar, 454 U.S. at 272 n.11 (internal quotation marks and citations omitted).[18] Thus, treating religious expression on equal terms with secular expression "would in fact *avoid* entanglement with religion," *Mergens*, 496 U.S. 248 (plurality) (emphasis in original; citation omitted); *see also id.* at 253.

CONCLUSION

In light of the foregoing, the meritlessness of respondents' position becomes clear. Respondents would condemn the Santa Fe Football Policy because it *allows the possibility* of student prayer. But the alternative - selective censorship and suppression of the religious message any student might choose - would create obvious constitutional problems. Fortunately, as demonstrated previously, no such censorship is required. As Justice O'Connor wrote for the plurality in *Mergens*,

> [t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.

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[18]These same entanglement problems plague any attempt to impose a "nonsectarian, nonproselytizing" requirement on private speech. For precisely that reason, the school district adopted a policy that omitted any such requirement unless and until a court ordered that it be imposed. Pet. App. at F1-F2. *See also* Tr. 8/4/95 at 3-7 (District Court and counsel for the school district voicing concern about enforcing a "nonsectarian, nonproselytizing" requirement).

496 U.S. at 248 (internal quotation marks and citation omitted).

This Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

John G. Stepanovich
Thomas P. Monaghan
Stuart J. Roth
John P. Tuskey
Joel H. Thornton
David A. Cortman
American Center for Law & Justice
1000 Regent Univ. Drive
Virginia Beach, VA 23464
(757) 226-2489

Jay Alan Sekulow
Counsel of Record
Colby M. May
James M. Henderson, Sr.
Mark N. Troobnick
Walter M. Weber
American Center for Law & Justice
Suite 609
1000 Thos. Jefferson St. NW
Washington, DC 20007
(202) 337-2273

Kelly Shackelford
509 Cutter Lane
Allen, TX 75013
(972) 423-8889

Paul D. Clement
King & Spalding
1730 Pennsylvania Ave. NW
Washington, DC 20006
(202) 626-2640

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Attorneys for the Petitioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

—v.—

JANE DOE, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

Anthony P. Griffin
(*Counsel of Record*)
1115 Moody
Galveston, Texas 77550
(409) 763-0386

Douglas Laycock
4203 Woodway
Austin, Texas 78731
(512) 346-3127

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

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STATEMENT OF THE CASE

1. The Litigation. Plaintiffs are two mothers and their children who objected to persistent imposition of sectarian religious practices in the public schools of Santa Fe, Texas. The district court found a history of distinctively Christian prayer at graduation, prayer before every football and baseball game, school selection of the clergyman to conduct a subsidized baccalaureate service, and on-campus distribution of Bibles by the Gideons. The court further found that Santa Fe had encouraged and preferred religion clubs over other clubs and that multiple teachers had promoted their own religious views in the classroom. One teacher, after distributing flyers for a Baptist revival meeting to his class and discovering in the ensuing conversation that one of his students is Mormon, "launched into a diatribe about the non-Christian, cult-like nature of Mormonism, and its general evils." Pet. App. A4.[1]

The district court found that "these incidents occurred amidst the School District's repeated tolerance of similar activities and oftentimes with the awareness and explicit approval of the School District," and that "these incidents therefore reflect the actual policies of the School District at that time, irrespective of any applicable written policies which may have been in place." Pet. App. E2 n.2.[2]

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[1] These findings are set out in the district court's Findings of Fact, Pet. App. D3-D14, and in its Order of Summary Judgment on Liability Issues, *id.* at E1-E11, which is incorporated into the Findings of Fact and Conclusions of Law, *id.* at D2. The quotation is from the opinion of the court of appeals. Many of these facts are set out in greater detail in the parties' Stipulations, JA 43-67. Respondents will use the abbreviations set out in note 1 of Petitioner's Brief (Pet. Br.), and follow that brief's convention of referring to the Santa Fe Independent School District as Santa Fe.

[2] Later, when the issue had shifted from correction of unconstitutional
(continued...)

The district court permitted plaintiffs to proceed pseudonymously, and found it necessary to threaten "the harshest possible contempt sanctions" if school employees continued their efforts "to ferret out the identities of the Plaintiffs." JA 35. The court closed the trial for the testimony of the minor plaintiffs, because of "the possibility of social ostracization and violence due to militant religious attitudes." Order at 9 (dkt. 39, July 22, 1996). There was uncontradicted evidence of verbal harassment of students who declined to accept Bibles or objected to prayers and religious observances in school. Tr. 7/25/96 at 98-99, 197, 208-09. One witness -- *not* a plaintiff -- began home-schooling her youngest daughter to avoid persistent verbal harassment, with pushing and shoving, over issues of religion in the public school. *Id.* at 82-83.

2. Prayer At Football Games. The Student Council Chaplain is an officer of the student council, elected by class representatives, whose duties are to "lead the Pledge of Allegiance and say the prayer at all meetings, athletic events and other occasions when the Student Council is asked to do this." Constitution of the Student Council, JA 94. Before this lawsuit was filed, the chaplain delivered a prayer over the public address system before all home football games.

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[2] (...continued)
practices to damages for the past, the district court gave greater weight to Santa Fe's written policy prohibiting prayer or religious instruction in the classroom, and to its after-the-fact responses to complaints about classroom incidents, concluding that no school policy had proximately caused any damage to plaintiffs. Findings 15, 23, 30 at Pet. App. D6-D10. This opinion also incorporated and reaffirmed the findings in the summary judgment order, *id.* at D2, including the findings quoted in text. Plaintiffs appealed the denial of damages only with respect to the in-class Mormon diatribe; the court of appeals affirmed without deciding whether that episode stemmed from school policy. Pet. App. A40-A41. There is no dispute that the Football Policy and the similar policy for graduation are official school policies.

Stip. 123 at JA 64.

This lawsuit was filed in April 1995. Santa Fe made no effort to defend its existing policies, but instead immediately began revising its policies to a form it hoped to be able to defend. Santa Fe's lawyer opened the very first hearing by announcing "changes that have been made within the district." Tr. 5/5/95 at 21. On August 18, Stip. 129 at JA 65, the school board issued a new policy governing prayer at football games; that policy is set out at JA 99-101. In October, the board adopted the Football Policy at issue here; that policy is set out at JA 104-05, Pet. App. F1-F2, and Pet. Br. 3. Santa Fe attaches great significance to the following slight differences between these policies (all emphases added):

- The August policy was entitled "*Prayer* at Football Games"; the current policy is entitled "*Pre-Game Ceremonies* at Football Games."

- The August policy said that "the Board has chosen to permit *invocations*" and provided for student elections to determine if "*invocations*" are to be delivered and if so, who is "to deliver the *invocations*." The current policy says that "the Board has chosen to permit *a brief invocation and/or message*" and provides for student elections to determine whether "*such a statement or invocation*" will be delivered and, if so, who is "to deliver the *statement or invocation*."

- The August policy said that the purpose of the invocation is "to solemnize the event and to establish the appropriate environment for the competition." The current policy states the same two purposes and adds an additional purpose to "*promote good sportsmanship and student safety*."

- The current policy says that the student volunteer "*may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.*" The August policy had no corresponding provision.

Both policies provide that the election is to be conducted once a year, in the spring, so that the student elected serves for the entire football season. Both policies also provide that the election is to be conducted by the student council "upon advice and direction of the high school principal." JA 99, 100, 104, 105. By its constitution, the student council is responsible for "any duty or responsibility assigned to the Student Council by the administration," JA 89, and the student council's advisors have "the RIGHT TO VETO ANY ACTION of the Student Council which is not standing [sic] with present policy." *Id.* at 88 (emphasis in original).

Finally, both policies set out a backup policy in case Santa Fe's preferred policy is enjoined from operation. The backup policy requires that the "invocations" (August policy), or any "message and/or invocation" (current policy) be "nonsectarian" and "nonproselytizing." *Id.* at 100, 105. In each version, Santa Fe's preferred policy omits the "nonsectarian, nonproselytizing" requirement.[3]

The school board adopted both versions of the Football Policy after the first student prayer elections had been held and the outcomes were known. In the spring of 1995, Santa Fe's superintendent "met with the senior class officers to discuss the election regarding prayer at graduation." Stips. 16, 49 at JA 45, 52. In May 1995, the senior class voted for prayer (not yet described as an "invocation and/or message") as part of the graduation program, and then elected

[3] The summary of the current policy at Pet. Br. 10-11 is inaccurate. Paragraphs cited to JA 104 are part of the policy; paragraphs cited to JA 31 or JA 32 are *not* part of the policy. Citations to JA 31-32 are to an Interim Order "intended to resolve only immediately pending problems." JA31. This order was superseded by the ultimate denial of injunctive relief, Pet. App. D19, E13, and certainly by the judgment of the court of appeals reversing the district court with respect to football prayers. *Id.* at A41.

two named students to give the prayers. Stips. 51-53 at JA 52. On August 31, 1995, the students voted for prayer (still not described as an "invocation and/or message") as part of the program at football games and, on September 7, they elected a named student to deliver the prayers. Stips. 130-31 at JA 65-66. The August Football Policy was adopted after the graduation prayer elections, and the current Football Policy was adopted after both sets of prayer elections.

The record in this case closed before the 1996 football season. But one of Santa Fe's *amici* has submitted documents, filed as part of the record in related litigation against Santa Fe in the same federal court, that reveal the workings of the Football Policy during the 1999 football season. Brief for Marian Ward, App. C, D, F. In May 1999, the students again voted for a message at football games. *Id.* at C2. School administrators threatened to discipline any student who prayed in defiance of the court of appeals' order in this case. *Id.* at C2-C3. "In response to this threat," the student elected to give the message resigned. *Id.* at 3 n.6. Marian Ward, the runner up, took her place. *Id.* at C3. Ward believes "that a prayer is the best way to solemnize, formalize and dignify almost any event." *Id.* at C5. She sued the school district, asserting that her free speech rights would be violated if she could give a message at the football game but could not pray. Even though this very free speech theory had been squarely rejected in the court of appeals' opinion in this case, Pet. App. A27-A36, a district judge granted a temporary restraining order and then a preliminary injunction forbidding Santa Fe from interfering with Ward's plans to offer prayer as part of the program at football games. Ward Brief at F1-F9.[4]

[4] Ward's father is the pastor at the Santa Fe Baptist Church. She prayed in Jesus' name and received a standing ovation. "Teen Says Pre-Game Prayer After Court Order Clears Away," Dallas Morning News, Sept. 4, 1999.

Another of Santa Fe's *amici* has highlighted another important fact, so well known to Texans that it received only passing mention in the record. Texas high school football, especially in small towns, is an event of remarkable importance. *See generally* H.G. Bissinger, FRIDAY NIGHT LIGHTS (1990). Each football game is "a major community-wide social event, complete with the kind of attendance that is reserved for other special or 'rite of passage' occurrences." Brief of Texas Ass'n of School Boards Legal Assistance Fund at 6. In that respect, football is indistinguishable from graduation. *Id.* The district court took judicial notice of these facts:

> [H]igh school football, which is ten or twelve games at most a season for these kids, is the apex of their social function. It is a very big deal to the community. The entire community turns out for these things. And it really is a big part of these kids' lives. I think, frankly, considering the academic interests of a lot of kids, football is probably a heck of a lot more important than graduation.

Tr. 8/4/95 at 23.

3. Fifth Circuit Law And The Judgments Below. Prior opinions of the court of appeals are of course not binding in this Court. But the case below was litigated under a set of Fifth Circuit rules that must be explained.

The Fifth Circuit rule, established well before the summary judgment on liability in this case, was as follows: Student-led prayer is permitted as part of a school's program at graduation -- but not at any other school event -- if it is approved by vote of the students and if it is nonsectarian and nonproselytizing. The graduation part of this rule emerged in *Jones v. Clear Creek Indep. School Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993), decided on remand in light of *Lee v. Weisman*, 505 U.S.

577 (1992).

Mississippi subsequently enacted a School Prayer Statute, which attempted to codify the *Clear Creek* standard and apply it throughout the public schools. The statute authorized "nonsectarian, nonproselytizing student-initiated voluntary prayer" at all school-related events, whether "compulsory or noncompulsory." Miss. Code §37-13-4.1(2) (1996). A federal district court entered a preliminary injunction against implementation of the Prayer Statute in all its applications except graduation, *Ingebretsen v. Jackson Public School Dist.*, 864 F.Supp. 1473 (S.D.Miss. 1994), and the Fifth Circuit affirmed, 88 F.3d 274 (5th Cir. 1996), expressly declining to reconsider *Clear Creek*, 88 F.3d at 280.

Even before *Ingebretsen*, the Fifth Circuit had distinguished athletic events from *Clear Creek*'s graduation rule. In *Doe v. Duncanville Indep. School Dist.*, 994 F.2d 160 (5th Cir. 1993), the court affirmed a preliminary injunction against school-encouraged prayer "during curricular or extracurricular activities, including before, during, or after school-related sporting events." *Id.* at 163. In a subsequent appeal, the Duncanville schools relied on *Clear Creek* to attack a provision of the permanent injunction forbidding school employees from supervising or participating in prayer initiated by students. The court rejected Duncanville's argument and affirmed the injunction, emphasizing "that high school graduation is a significant, once-in-a-lifetime event," and that the athletic events principally at issue in *Duncanville* were "a setting that is far less solemn and extraordinary." *Doe v. Duncanville Indep. School Dist.*, 70 F.3d 402, 406-07 (5th Cir. 1995). Although plaintiffs believe that prayer is constitutionally impermissible in both settings, there is no doubt that the Fifth Circuit had confined *Clear Creek* to graduation and applied a different rule to athletic events.

The Fifth Circuit rules dictated the result in the court of

appeals. Prayers as part of the graduation program were limited to prayers that are nonsectarian and nonproselytizing, and prayers as part of the pre-game football ceremonies were forbidden without regard to the content of the prayers. Most of the court of appeals' opinion is devoted to Santa Fe's attack on *Clear Creek*'s requirement that prayer be nonsectarian and nonproselytizing if it is permitted at all. Pet. App. A14-A37. The majority below viewed football prayer as an essentially settled issue, devoting only two paragraphs to concluding that this case could not be distinguished from *Duncanville* and *Ingebretsen*. *Id.* at A37-A38.[5]

Neither side defends the Fifth Circuit's distinctions. Santa Fe believes that with a student vote it should be able to have student prayer as part of the program at all school events, not just graduation, and that it should be able to have sectarian and proselytizing prayer if that is what a majority of students want. Plaintiffs believe a student vote cannot constitutionally authorize prayer that Santa Fe could not sponsor more forthrightly, that graduation should not be an exception (although that issue is not presented here), and that limiting the content of the prayers does nothing to solve the constitutional problems.

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[5] Because football prayer was a settled issue in the Fifth Circuit, the details of the Football Policy were largely irrelevant in the courts below, and the record is sketchy with respect to football prayer. Fortunately, football games "are such an integral part of American cultural life that [this Court] can with confidence describe their customary features." *Lee v. Weisman*, 505 U.S. at 583.

Although Santa Fe now claims that *Clear Creek* authorized at least its backup football policy, Pet. Br. 3-4, 27 n.11, Santa Fe's trial counsel more candidly conceded that "the *Jones v. Clear Creek* language for football games has not been approved by the Fifth Circuit at this point." Tr. 8/4/95 at 12. "This point" was even before *Ingebretsen* and *Duncanville II* expressly held *Clear Creek* inapplicable to athletic events.

SUMMARY OF ARGUMENT

Both sides agree that if Santa Fe has sponsored or encouraged prayers as part of the program at football games, it has violated the Constitution. Both sides also agree that genuinely private religious speech is constitutionally protected.

The prayers in this case are clearly sponsored and encouraged by the school. Santa Fe has long been committed to prayer at official school events. Football games are such an event; Santa Fe organizes and wholly controls the program. It has conditionally delegated a small portion of that program to a single student, selected by majoritarian political processes. The student's remarks must support the school's event and may address only a narrow range of topics.

Neither the referendum nor the delegation to the chosen student serves any of the purposes of the First Amendment's distinction between government religious speech and private religious speech. Protection for private religious speech protects individual choices. Santa Fe's policy is designed to achieve a single, majoritarian answer to the religious questions of whether and how to pray at football games, and to impose that answer on everyone in the school. If a student vote could privatize prayer, students could vote for prayer in the classroom, and public schools could evade every one of this Court's school prayer cases, beginning with *Engel v. Vitale*, 370 U.S. 421 (1962).

The policy coerces students to attend and participate in a religious exercise. School rules require numerous students to attend, and most other students view the event as a rite of passage that cannot be missed.

The policy was adopted for the actual purpose of perpetuating prayer at football games, and any reasonable observer would understand the policy as an unmistakable endorsement of prayer at school events. The policy gives reli-

gious speech preferential access to the public address system. The policy cannot be understood as a free speech policy, because the school subjects all other public speech by students to pervasive prior restraints. The policy is not needed to solemnize the event; the National Anthem and other readily available secular means could do that.

The policy is facially unconstitutional. The school's purpose, the message of endorsement, the preferential access for a single speaker, the narrow restrictions on what that speaker may say, and the submission of religious questions to a referendum all appear on the face of the policy, some within the four corners and all when read in the historical and legal context in which the policy was enacted. None of these constitutional defects depend on whether the elected student eventually delivers a prayer; the school board first violated the Constitution when it endorsed prayer. The policy is also unconstitutional as applied, and there is ample evidence of implementation to support that determination.

ARGUMENT

I. SANTA FE IS FULLY RESPONSIBLE FOR ITS CHOICE TO ENCOURAGE PRAYER AS PART OF THE PROGRAM AT FOOTBALL GAMES AND FOR THE RESULTING PUBLIC PRAYERS

Santa Fe and its *amici* rely, fundamentally and repeatedly, on the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Pet. Br. 12, 19-20, 28, 36, 41 (all quoting or closely paraphrasing the same sentence from *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990)(plurality)).[6] That is, Santa Fe concedes that if it has sponsored or encouraged prayers as part of the program at football games, it has violated the Constitution. Its defense is that these prayers and the decision to offer them were private decisions.

Santa Fe had no realistic choice but to concede that the Establishment Clause forbids government-sponsored religious speech in a public school. This Court has repeatedly so held, most recently in *Lee v. Weisman*, 505 U.S. 577, invalidating prayers offered as part of the program at public school graduations. There are similar holdings in *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Treen v. Karen B.*, 455 U.S. 913 (1982); *Stone v. Graham*, 449 U.S. 39 (1980); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); and *Engel v. Vitale*, 370 U.S. 421. "No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise." *Lee*, 505 U.S. at 599.

The problem is not with the distinction between governmental and private prayer, which is fundamental to the First Amendment and which plaintiffs fully accept.[7] The problem is with Santa Fe's interpretation of the distinction and with its wholly unrealistic view of undisputed facts.

Santa Fe claims that it is not responsible for prayer delivered: (a) over the school's public address system; (b) as part of a ceremony organized and sponsored by the school and wholly subject to the school's control; (c) by a single

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[6] This sentence is quoted with approval in *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 841 (1995), and in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995)(plurality opinion).

[7] *See generally* Douglas Laycock, "Freedom of Speech That Is Both Religious and Political," 29 U.C. Davis L.Rev. 793 (1996); Douglas Laycock, "Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers," 81 Nw. U.L. Rev. 1 (1986).

speaker chosen for an entire season and given exclusive preference over all other possible speakers; (d) to a large crowd assembled at the school's invitation for an official school event of unusual importance in the community; and (e) to numerous students required to be present by the school's command. This is a school district, moreover, where prayers have long been delivered with no pretense of separating the school from the prayer, notwithstanding this Court's repeated admonition that the risks of religious indoctrination are especially high in a public school setting. Santa Fe nonetheless argues that it can and should be absolved of all constitutional responsibility in this case because it delegated a narrow range of decisions about the football game prayer from one majoritarian political process (a vote of the school board) to a different majoritarian political process (a referendum among the students). The school district's theory is untenable, both factually and legally.

Factually, the court of appeals suggested that the claimed delegation is a sham. Pet. App. A20. Plaintiffs agree, but the case does not depend on that. Even if the delegation were not a sham, it would at best be wholly ineffectual to separate the government either from the prayers at football games or from the decision to offer prayers at football games. Neither the delegation nor the referendum serves any of the purposes of the First Amendment's distinction between government religious speech and private religious speech. Santa Fe's policy is designed to achieve a single, majoritarian answer to the religious questions of whether and how to pray at football games, and to impose that answer on everyone in the school. The First Amendment is designed to permit many different answers to religious questions -- as many answers as there are opinions in the population -- and to permit no one to use the instruments of government to impose one of these answers on others who come to a different answer.

There are many independent and mutually reinforcing

reasons for holding that both the decision to encourage prayer, and the prayers themselves, are fairly attributable to the state. Most of these reasons would be independently sufficient; cumulatively, they are greater than the sum of the parts.

A. Santa Fe Is Responsible Because Its Football Policy Implements The School's Historic And Continuing Support For Prayer As Part Of The Program At School Events

The current Football Policy grows directly out of the longstanding prior practice in which, without camouflage, the school sponsored public prayers at football games. Football prayers were historically delivered by the chaplain, whose office exists to deliver prayers whenever asked. JA 94. Football prayer was part and parcel of Santa Fe's open support for evangelical Christianity in a variety of school contexts. The district court's findings of fact are replete with examples. Pet. App. D3-D14, E1-E11.

On the eve of the first football season after this litigation was filed, the school board adopted a new policy providing for a student election on whether to offer invocations at football games. Two months later, the board made the cosmetic changes detailed *supra* at 3-4, deleting the word "prayer," and adding to the provision for "invocations" the choice of "invocation and/or message." These changes minimally adjusted Santa Fe's longstanding policy, trying to make it more defensible in response to this litigation, without risking any change in what would actually happen at football games. Santa Fe's repeated pre-trial amendments to its policy, and its willingness to litigate the issue all the way to this Court, do not reflect an intense desire to be surprised by whatever unexpected message a student might deliver. Rather, these acts reflect an intense commitment to leading the crowd in prayer at football games. As Santa Fe's trial counsel described the board's motives: "they want to push

it as far as the Constitution will allow them to push it." Tr. 8/4/95 at 31. That is a legitimate desire, but it is not consistent with the claim that Santa Fe is indifferent to whether its Football Policy ever results in prayer, or that the students decided to pray all on their own.

Santa Fe claims that it is committed only to free speech for students. But this claim is belied by its lack of commitment to student free speech in other contexts. Santa Fe provides for an all-inclusive system of prior restraint over "all publications edited, printed, or distributed in the name of or within the District schools" and of "all written material . . . intended for distribution to students." JA 68-69. Prior to this litigation, all student prayers and speeches at graduation were subject to prior review by the faculty or administration, and the school retained the power to mute the microphone or remove a student speaker. Stips. 40-42, JA 51-52. Since this litigation, the same system of prior restraint continues over all student speeches at graduation except the invocation or message in lieu of an invocation. Stip. 54, 59 at JA 53-54. Santa Fe permits public speech free of prior restraint to only two students per year -- one at football games and one at graduation. And it granted this narrow liberty only after so arranging matters that it could confidently expect the students to deliver Christian prayers.

The juxtaposition of these policies shows a primary purpose not to protect free speech, but to continue public prayer at school events. As further elaborated *infra*, this is an unconstitutional purpose. *Wallace v. Jaffree*, 472 U.S. at 55-56; *Stone v. Graham*, 449 U.S. at 40-41; *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Abington School Dist. v. Schempp*, 374 U.S. at 222. This same juxtaposition of policies would lead any reasonable observer to conclude that Santa Fe is endorsing and encouraging public prayer at official school events. *See County of Allegheny v. ACLU*, 492 U.S. 573, 589-94 (1989); *Wallace v. Jaffree*, 472 U.S. at 56

& n.42, 60-61; *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984)(O'Connor, J., concurring)(all prohibiting government conduct that endorses or disapproves of religion). No reasonable observer could believe the school was indifferent to prayer and committed only to free speech. Indeed, a reasonable observer would see that Santa Fe is working desperately to preserve prayer as part of the program at school events.

B. Santa Fe Is Responsible Because It Sponsors And Controls The Program, And Its Conditional Delegation To A Selected Student Does Not Privatize The Delegated Interlude

Football games, and the accompanying pre-game ceremonies, are official school events. Santa Fe schedules the event and attracts the crowd for the school's purposes, which must as a matter of law be secular purposes. Santa Fe controls the program. Santa Fe cannot control the outcome of the game, but it fully controls the pre-game ceremonies and it controls the public address system. No one can speak over the stadium's public address system at an official school event without the permission and cooperation of the school.

Plaintiffs do not rely on the mere fact that Santa Fe *owns* the stadium and public address system. Private groups could be allowed to use school facilities for private purposes, and control could be genuinely relinquished to a range of private voices, as in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). But this is far from such a case. In *Lamb's Chapel*, private programs were clearly separated from the school's own programs, and the school's facilities were available to a wide range of private community groups on an equal basis. The religious films in *Lamb's Chapel* were not inserted into the middle of an official school event otherwise wholly controlled by the school, and they were not shown to an audi-

ence that had assembled for secular and school-related purposes. In *Lamb's Chapel*, there was a separate and private program -- not an allegedly private interlude in an otherwise wholly governmental program. The private program was controlled by its private sponsors, it was clearly separated in time from the school's own programs, and the religious films were advertised as such and shown to an audience that assembled for the purpose of seeing religious films.

The point is not ownership, but rather that Santa Fe *controls* the program and the public address system. It has delegated a brief portion of the program to a single student, and that student speaks as the school's delegatee. It is not just any student who can seize the microphone, but only one student, selected by a process instituted by the school. This delegatee has no right to speak except as Santa Fe has granted a right to speak. "The board has chosen" to permit an invocation or message, as the Football Policy accurately states. JA 104.

Santa Fe's control over pre-game ceremonies is as complete legally as it is factually. Under this Court's decisions, schools have broad authority over student speech in school-sponsored publications and events. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). They have no obligation to promote speech "that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* They may exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns," *id.* at 273, which include preserving the school's appearance of neutrality on controversial matters, *id.* at 272.

Santa Fe relies on this Court's cases holding that religious functions are constitutionally privatized when they result from "the *independent*, intervening choices of individuals." Pet. Br. 19 (emphasis added). But the chosen student

speaker is not independent. Santa Fe delegates the right to speak only conditionally, for the school's own purposes. Those purposes are narrowly confined and directly focused on the official school event. The student speaker cannot deliver just any message; she cannot choose a topic or pursue an agenda of her own. Rather, she must address Santa Fe's agenda. Her invocation or message must be "consistent with the goals and purposes of this policy." JA 104. And Santa Fe presumably retains -- it certainly has not disavowed -- the power to punish student speakers who stray outside these boundaries.

Even taking Santa Fe's alleged secular purposes at face value, "the goals and purposes of this policy" are narrow purposes: "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." *Id.* Of course "the event" is Santa Fe's football game; "the competition" is Santa Fe's football game; and "good sportsmanship and student safety" are needed at Santa Fe's football game. The student invocation or message is required to be an integral part of, and to serve the purposes of, the ceremonies introducing Santa Fe's football game.

Of the near infinity of messages that can be composed in the English language, only a tiny percentage would satisfy the conditions of the school's delegation. Neither a parody, nor a math lesson, nor the school's latest gossip, nor a demand to fire the football coach, nor an attack on the school board, nor a political stump speech, nor a discussion of this Court's cases, nor a disquisition on any other controversial issue would serve the stated purposes of the Football Policy. This delegation of a small part of Santa Fe's pregame ceremony is not about genuine freedom of speech; it is certainly not an opportunity for robust and uninhibited debate. Interpreted most generously to Santa Fe, the delegatee must fit her remarks into the school's official program, and she must support that program. The delegatee is

given an opportunity to do for the school what the school cannot legally do for itself. In short, the school has attempted "to contract out its establishment of religion." *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 792 (1995)(Souter, J., concurring).

Santa Fe does not contend, nor could it, that it has created a public forum at football games. "School officials did not evince either 'by policy or practice' any intent to open the [stadium's public address system] to 'indiscriminate use'" by the student body or by any subset of the student body. *Hazelwood*, 484 U.S. at 270, quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983). "[S]elective access does not turn government property into a public forum." *Perry*, 460 U.S. at 47. The Court has rejected public forum claims even in cases where government had allowed multiple speakers to speak in the alleged forum. *Perry, id.*; *Greer v. Spock*, 424 U.S. 828, 831 (1976). One carefully selected speaker per year, confined to a narrowly focused range of topics, does not create a public forum in any sense of the word.

The conditional delegation is not even viewpoint neutral. The student speaker may "promote" good sportsmanship, but she may not denigrate or question the value of good sportsmanship. Anti-religious messages, or dissenting religious messages of any kind, are unauthorized. A message questioning the existence of God, or denying that Jesus is the Messiah, or explaining that plaintiff's teacher was wrong about the Mormons, could not plausibly be connected to the football game or to any of the three authorized purposes of the invocation or message.

But other religious messages are expressly authorized and even encouraged. An "invocation" is the only type of message singled out for express authorization, and Santa Fe concedes that an "invocation" is a religious message. Pet.

Br. 25-26. More precisely, an invocation is a prayer.[8] Moreover, Santa Fe's preferred policy, read against its backup policy, expressly authorizes and encourages messages that are sectarian and proselytizing.

Santa Fe makes much of the difference between its current Football Policy, providing for an "invocation and/or message," as compared to the previous policy that provided only for an invocation. But this change is the thinnest of disguises, not only because everyone understands what is meant, but more fundamentally because even on the face of the policy, "message" does not carry anything like its general meaning. "Message" is confined to only those few messages that serve the school's narrow purposes.

Including prayers with a narrow range of possible secular messages does not suffice to make the policy neutral. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (Harlan, J., concurring). The "critical question" is whether the state has defined "a class so broad" that religion falls within its

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[8] **invocation 1a:** the action or an act of petitioning for help or support; *specif. often cap:* a prayer of entreaty that is usu. a call for the divine presence and is offered at the beginning of a meeting or service of worship.

Webster's Third New International Dictionary of the English Language Unabridged (1961, 1981).

invocation *n.* 1. the act of invoking or calling upon a deity, spirit, etc., for aid, protection, inspiration, or the like; supplication . . . . 3. a form of prayer invoking God's presence, esp. one said at the beginning of a religious service or public ceremony.

Random House Dictionary of the English Language Unabridged (2d ed. 1987).

"natural perimeter." *Walz*, 397 U.S. at 696 (Harlan, J., concurring). Santa Fe has not authorized a broad class of all messages, which might naturally include religious messages; it has rather authorized a narrow class of messages, gerrymandered around the religious messages that were its focus.

C. Santa Fe Is Responsible Because The School Board's Delegation To A Student Vote Does Not Privatize The Resulting Decisions

The specific content of the invocation or message is conditionally delegated to the selected student, as discussed above. The decision whether to have an invocation or message, and selection of the student to deliver it, is delegated to a vote of the student body. This vote serves none of the purposes of the First Amendment and is itself an unconstitutional feature of Santa Fe's Football Policy.

1. Delegation To Another Majoritarian Political Process Serves None Of The Purposes Of The First Amendment

A core policy of the First Amendment is to prevent imposition of the majority's religious views on the minority. Subjecting these rights to majority vote does not remove government from the process; it merely highlights the constitutional violation. "[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

For First Amendment purposes, it makes no difference whether the vote is taken by the elected school board, by the registered voters in the district, or by the students in the school. Each body of potential voters is broadly representative of the same constituency; each will reliably deliver the majoritarian result.

Santa Fe relies on this Court's cases holding that religious functions are constitutionally privatized when they

result from "the independent, intervening choices *of individuals*." Pet. Br. 19 (emphasis added). But as shown above, the elected student speaker is not "independent"; she is subject to the restrictive conditions in Santa Fe's delegation of a chance to speak. And the student vote is not the choice "of individuals"; it is the collective choice of the student body as a whole. The student vote serves none of the First Amendment functions that make sense of this Court's cases.

In all the cases on which Santa Fe relies, both in the speech cases and in the funding cases, the intervening private decisions were made by individuals acting separately or in voluntary associations. These individual decisions serve the core First Amendment purpose of protecting a diversity of views and letting each individual decide for himself. In all those cases, different individuals and different voluntary associations could make different choices, and each individual could act on the choice he made. There were multiple clubs meeting in empty classrooms in *Board of Educ. v. Mergens*, 496 U.S. 226; and in *Widmar v. Vincent*, 454 U.S. 263 (1981); multiple community groups using the school facilities in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384; multiple displays on the capitol grounds in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753; and multiple student publications and activities in *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995). "The provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar*, 454 U.S. at 274.

Similarly, in the funding cases, each family chose its own school from multiple possibilities in *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983), and similar cases. There were also multiple grantees, selected on nondiscriminatory criteria, in

Bowen v. Kendrick, 487 U.S. 589 (1988). To be sure, the funding cases raise the far more difficult issue of direct financial benefit to religious institutions, but no resolution of those cases lends any support to a program with only one beneficiary selected by majority vote. In both the speech cases and the funding cases, none of the programs was skewed in favor of religion; no participant was permitted to proselytize a government-assembled audience; and government did not require or even encourage any individual to participate in a religious program.

This case is entirely different. Here the purpose of the vote is to produce one collective decision which will then be imposed on everybody. Individuals can choose how to vote, but they cannot choose to speak, they cannot choose to hear any speaker different from the one elected by the majority, and they cannot choose to hear any message different from the messages delivered by the speaker elected by the majority. A single speaker, preferred by the majority, is elected for the entire year, and all other speakers are excluded for the entire year -- excluded from what Santa Fe claims is an opportunity for free speech. There is no room for either individual choice or diversity of views.

The Court has long worried about the possibility that "a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of [government] approval." *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring); *see also Rosenberger*, 515 U.S. at 850-51 (O'Connor, J., concurring); *Widmar*, 454 U.S. at 275. Here, it does not just happen that one speaker dominates; the whole process is structured from the beginning to ensure that only one speaker gets to speak, that the one selected speaker will reliably represent the majority's views, and that no dissenting views will ever be heard. This is not even a "formal policy of equal access." It is instead a formal policy of exclusive access for one speaker representing the views of the majority.

Nor will there be a diversity of views over time. It is a well-understood feature of majoritarian processes that a reliable majority can win every election. Even a modest majority will get its way 100% of the time if the election is dominated by a single issue on which views are polarized. "[W]here minority and majority voters consistently prefer different candidates [or prayer policies], the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986). These student elections have been conducted in the context of a highly publicized dispute over prayer at football games; few students could understand these elections as anything but a vote on that dispute:

> [B]y directing the citizen's attention to the single consideration of race or color [or prayer at football games], the State indicates that a candidate's race or color [or position on prayer at football games] is an important -- perhaps paramount -- consideration in the citizen's choice.

Anderson v. Martin, 375 U.S. 399, 402 (1964).

Addition of the phrase "and/or message" to the policy and the ballot does not change the constitutional significance of the student vote; it remains, in substance and effect, a vote on invocations. A no vote is unambiguously a vote against invocations. A yes vote is a vote for at least the possibility of invocations and, if voters know either the candidates' views or the expectations placed on the candidates, a yes vote may be a vote for the near certainty of invocations. The 1999 voting shows that this information is reliably available. The top two candidates were both so committed to prayer that one resigned, and the other filed a lawsuit, rather than comply with the judgment of the court of appeals. *See supra* 4-5.

Santa Fe's focus on prayer as the central issue increases

the polarization of the voting process and thus increases the reliability of the outcome. But these implicit voting instructions are not essential to the fundamental point: a government agency cannot institute a religious exercise on the basis of a majority vote.

2. The Student Election Exercises Government Authority Delegated By The School Board

The students do not vote as a private club making a decision only for its members. These student elections make a decision binding on the whole community. The student election has binding force only because the school board decided to give it binding force. Everyone at the football game listens to the speaker chosen by the student election. Why? Not because the students have any such power acting on their own, but only because the school board decided that everyone at the football game must listen to the speaker chosen by the student election.

Like the delegation to the selected speaker, this delegation to the student body is subject to oversight by the school. The student council exists in part to perform "any duty or responsibility assigned to the Student Council by the administration," JA 89, and football speaker elections have been so assigned. JA 104, 105. Student council actions are subject to veto by the student council's advisors, JA 88, and lest there be any doubt, both versions of the Football Policy repeatedly provide that these elections are conducted "upon advice and direction of the high school principal." JA 99, 100, 104, 105.

A referendum does nothing to insulate unconstitutional decisions from judicial review; a government decision made by the voters is just as much a government decision as one made by their elected representatives. *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736-37 (1964); *see Romer v. Evans*, 517 U.S. 620, 623 (1996)(striking down the results of a referendum). "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas*, 377 U.S. at 736-37. "[M]ajority votes do not, as such, defeat First Amendment protections." *Nixon v. Shrink Mo. Gov't PAC*, No. 98-963 (Jan. 24, 2000), slip op. at 14.

It is equally irrelevant that the school board referred this matter to a vote of the student body instead of to the general electorate. This Court has permitted governments to designate a "selected class of voters," *Ball v. James*, 451 U.S. 355, 371 (1981), to elect representatives for a "special limited purpose" whose decisions will have "disproportionate effect" on those made eligible to vote. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973). *See also Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743 (1973)(upholding referendum among special classes of voters).

Here, the Santa Fe school board designated a "selected class of voters" to decide, by referendum, one important policy question facing the school and, if necessary, to elect a representative to execute the chosen policy. It is irrelevant that the students are unable to "exercise what might be thought of as 'normal governmental' authority"; that was also true in *Salyer*. 410 U.S. at 729. It is equally irrelevant that many of the students would not have been eligible to vote in a general election in Santa Fe; that too was true in *Salyer*, where nonresident and corporate landowners were permitted to vote. *Id.* at 730. As in *Salyer* and its progeny, the students' authority was derived from officials chosen in a general election and subject to supervision or revocation by those same officials. *Ball*, 451 U.S. at 371 n.20; *Associated Enterprises*, 410 U.S. at 744. This Court held long ago, in *The White Primary Cases*, that government cannot escape its constitutional obligations by deferring to pur-

portedly private voting procedures. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944). A referendum is no less a referendum, and an election is no less an election, when the school board designates a special class of voters.

It may seem odd to think of high school students as exercising governmental power, but that is only because it is odd for them to be delegated such power. The oddity is in Santa Fe's delegation, not in the constitutional analysis of that delegation. If the students voted to segregate seating at the football stadium, confining blacks to the end zone, and if the school board authorized elected student marshals to implement that decision, surely we would not be debating the school's responsibility for the resulting equal protection violation. Similarly, if the students voted to exclude Catholics and Mormons from the stadium, and the school board empowered students to implement that decision, the school would be responsible for the resulting free exercise violation.

Of course, not all student elections exercise power delegated by the school board, and most things students get to vote on pose few or no constitutional issues. Sometimes students vote on matters that are wholly up to them. Sometimes they vote in voluntary groups within the school; these votes are typically the actions of a single club and not the actions of the school. But when the school delegates to a student referendum the power to control part of an official school program, the constitutional obligations that bind the school must accompany the delegation.

D. If Santa Fe's Theory Were Accepted, It Would Logically Extend To All School Activities And All Forms Of Prayer, Including In The Classroom

The logic of Santa Fe's position has nothing to do with football. If a student vote and an elected student speaker

make these prayers private free speech, then a student vote and an elected student speaker could have the same privatizing effect at any other school event. The school controls the public address system in its stadium as fully as it controls the public address system in its gymnasium, its auditorium, and its classrooms. If students can vote for prayer over the school public address system at football games, they can vote for prayer over the intercom in their classrooms. On Santa Fe's reasoning, a student vote can effectively overrule or evade every one of this Court's school prayer cases, from *Engel v. Vitale*, 370 U.S. 421, to *Lee v. Weisman*, 505 U.S. 577.

If the Football Policy were applied to the classroom, then according to Santa Fe's argument:

> [T]he students in attendance [would] know to a moral certainty that the speech they [were] about to hear is private student speech, rather than speech directed and endorsed by the school. The students [would] know this because they [would] have participated in both the process of deciding whether to have a speaker and the separate process of selecting a speaker . . . . Any decision by a student speaker to offer an invocation [would] stand[] several intervening, student-made decisions removed from the school. Having participated in the decisionmaking process themselves, the students [could] not possibly view the school as endorsing the resulting student speech.

Pet. Br. 37-38.

That paragraph is the essence of Santa Fe's argument, elaborated throughout its brief. Nothing in that argument has anything to do with the venue of the prayer; it is equally applicable at graduation, at student assemblies, and in the classroom. Santa Fe eventually suggests in passing that

there is less coercion or endorsement at a football game than in the classroom, Pet. Br. 34, or at graduation, *id.* at 41-42. But only *government* coercion and endorsement are at issue here; the relevant coercion and endorsement arise only if the speech is first attributed to the school. The asserted locational distinctions are not rooted in Santa Fe's primary argument, nor necessary to it, nor even consistent with it. If the student vote and the elected student speaker really leaves the students "morally certain" that the school is not sponsoring or endorsing the prayer, there is no reason for students to become confused or reach the opposite conclusion when they hear the elected student speaker pray over a different public address system. If the message is so clearly student free speech, it is student free speech wherever it appears.

The dissenter below, who accepted Santa Fe's arguments with respect to both graduation and football, explained it this way:

> [T]he reason a *Clear Creek II* policy works is that it neutrally accommodates both religious and nonreligious speech in a limited public forum. Constitutionally speaking, *there are no location or other restrictions* on where the state may elect to create its designated or limited public fora.

Pet. App. B27-B28 (Jolly, J., dissenting)(emphasis added).

This is also how a Mississippi high school and the Mississippi legislature read *Jones v. Clear Creek Indep. School Dist.*, 977 F.2d 963. After *Clear Creek*, and following a student vote to authorize the practice, Wingfield High School in Jackson began opening each day with prayer "over the school intercom system to all students who, during which, were required to remain at their desks." *Ingebretsen v. Jackson Public School Dist.*, 864 F.Supp. 1473, 1478 (S.D.Miss. 1994), *aff'd*, 88 F.3d 274 (5th Cir. 1996). Straightforwardly applying the logic of *Clear Creek* and of

Santa Fe's argument here, the high school principal concluded that the student vote had privatized the prayer.

Under *Clear Creek*, Wingfield High had regressed to a point worse than the practice in this Court's original school prayer cases. At least in those cases, objecting students had been permitted to leave the room. *Abington School Dist. v. Schempp*, 374 U.S. at 224-25; *Engel v. Vitale*, 370 U.S. at 430. Of course this Court held that remedy inadequate, but nothing in the logic of *Clear Creek* and Santa Fe's argument appears to require even that inadequate remedy.

Higher ranking school officials stopped the classroom prayers at Wingfield High, and the Mississippi legislature responded to the ensuing controversy with its School Prayer Statute, authorizing "nonsectarian, nonproselytizing student-initiated voluntary prayer" at all school-related events, whether "compulsory or noncompulsory." Miss. Code §37-13-4.1(2) (1996). The School Prayer Statute assumed that if "student-initiation" works to privatize prayer at one official school event, it should work at any other school event. The Fifth Circuit, seeing what *Clear Creek* had unleashed, confined that case to graduation. *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274.

The issue is not location *per se*, but whether the school controls the program. Prayer in the classroom is where this Court first recognized the dangers of government-sponsored prayer. But when a voluntary student club uses the very same classroom a few hours later, this Court has held that prayer is unobjectionable. *Board of Educ. v. Mergens*, 496 U.S. 226. The location is the same, but the program is different, and control has shifted from the school to the club. The distinction between graduation and football seems arbitrary precisely because the school sponsors both events and controls the program at both events. The school also controls the public address system that reaches classrooms. Inside each individual classroom, the school actually has less

control than it has of the football public address system. Classroom teachers ask questions and lead discussions; students can respond; some will express alternative views. No one can respond to or argue with a public address system that only one person can use. If Santa Fe's position were adopted for football games, only the most arbitrary distinctions would prevent its being adopted for every other school event, including the classroom.

Santa Fe's shifting positions in this litigation also show the arbitrariness of distinctions among locations or events. In the Fifth Circuit, where *Clear Creek* protected public prayer at graduation, Santa Fe treated graduation and football as indistinguishable. *See* Pet. Br. 27 n.11, treating *Clear Creek* as dispositive below. In this Court, where *Clear Creek* is no authority and *Lee v. Weisman* holds that schools cannot sponsor prayer as part of their graduation programs, Santa Fe suggests that graduation and football are distinguishable. Pet. Br. at 41-42. If the Court were to announce different rules for different official school events, courts would face an endless series of such arbitrary arguments. Every school event would have to be separately adjudicated and, because all the arguments would be essentially arbitrary, there would be no standards for adjudication. The true rule is that there can be no majoritarian decision to lead the entire audience in prayer at a school-sponsored event.

Santa Fe's position also has implications for the content of prayers in public schools. Santa Fe says that, because the invocation or message is merely private speech, there can be no substantive limitation on what the student says. Pet. Br. 44-48 (arguing that exclusion of religious speech is unconstitutional); *id.* at n.18 (arguing that limitation to nonsectarian, nonproselytizing speech is unconstitutional); Cert. Pet. 22-27 (arguing that limitation to nonsectarian, nonproselytizing speech is viewpoint discrimination).

The Fifth Circuit's limitation to nonsectarian, nonproselytizing prayer at graduation is more sensitive to religious minorities but, constitutionally, it makes no sense. If the prayer is private, government has no authority to censor it; if the prayer is governmental, government has no authority to sponsor it. Neither conclusion depends on whether the prayer is sectarian or proselytizing. Government has no authority to sponsor sectarian prayers, "so-called nonsectarian" prayers, *Lee*, 505 U.S. at 585, or any other kinds of prayers, or to express any preference among the possibilities. As this Court has said, "the suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds [is] a contradiction that cannot be accepted." *Id.* at 590. *Accord Engel v. Vitale*, 370 U.S. at 430 ("fact that the prayer may be denominationally neutral" does not authorize state to sponsor it).

II. SANTA FE'S FOOTBALL POLICY VIOLATES EVERY EXTANT TEST UNDER THE ESTABLISHMENT CLAUSE

This argument began with the one point of agreement between the parties: if the football prayers are attributable to the school, Santa Fe has violated the Constitution. We have carefully explored the many reasons why the prayers, and the decision to encourage prayer, are attributable to the school. It remains to connect these premises to the Court's doctrinal structure.

A. Coercion

By including prayer as part of the official pre-game ceremonies, Santa Fe has coerced all those in attendance at football games to attend and participate in a religious exercise. This was the holding in *Lee v. Weisman*, 505 U.S. 577, and it is equally applicable here:

> Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory.

Id. at 586.

Here, the compulsion is in some ways greater than in *Lee*. Significant numbers of students are compelled to attend by official school policy. The parties stipulated that cheerleaders and band members are required to attend the pre-game ceremonies, including the prayer, and that band is a course for which some students receive academic credit. Stips. 126-28 at JA 65. It is obvious that the members of the football team are required to attend, as are the members of the opposing football team and its cheerleaders, and possibly its band. For all these students, who could easily total to more than a hundred, attendance is obligatory not just "in every practical sense," *Lee*, 505 U.S. at 598, but in the more stringent sense that school rules, backed by sanctions, mandate their attendance. On this basis, the district court found that prayers at football games are coercive. Pet. App. E8.

For the remaining students, attendance is "in a fair and real sense obligatory." 505 U.S. at 586. The state's school boards accurately assure the Court that attendance is a "rite of passage"; the district court noted that in Texas, "football is probably a heck of a lot more important than graduation." *See supra* at 6. Students cannot reasonably be expected to skip their graduation to avoid attendance at a religious exercise; even less can they be expected to skip four years of high school football, missing many events instead of one, to avoid attendance at a long series of religious exercises. "[T]o say a teenage student has a real choice not to attend" four years of high school football, at least in Texas, "is formalistic in the extreme." *Id.* at 595.

Lee also found another source of coercion. It is not just that graduation is important to most students, but also, and

perhaps more fundamentally, it is a school event that students are entitled to attend. "[T]he State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Id.* at 596. The importance of football and of graduation makes the coercion greater, but even if the event werehool event.

A student who is not a football player, a cheerleader, or a band member could in theory avoid the prayer by arriving late to the game. But this option also requires forfeiture of rights, and important ones to students: the chance to get a good seat; the chance to attend with friends, with a date, or as part of a social group; and the chance to see, hear, and participate in the rest of the opening ceremonies and rituals -- the band, the teams running on to the field, the National Anthem, the kickoff, etc.

Respondents believe the Constitution is violated when students are "*subjected* to state-sponsored religious exercises." *Id.* at 592 (emphasis added). That is, the Constitution is violated when students are coerced to *attend* a religious exercise, whether or not they are coerced to *participate* or to appear to participate. Coerced attendance at a religious exercise necessarily entails that the victim is "compelled to listen to the prayers or thoughts of others." *Wallace v. Jaffree*, 472 U.S. at 72 (O'Connor, J., concurring).

Coerced attendance at religious services is at the very core of the Establishment Clause. Mandatory church attendance in colonial Massachusetts, or in Stuart and Tudor England, are classic examples of establishment; no Justice has ever suggested that coerced church attendance would become constitutionally permissible if the state agreed that attendees need only go through the motions, without being expected to actually believe or actually pray. State-coerced attendance at a religious exercise violates the Establishment

Clause whether or not there is state-coerced participation.

When the state does coerce participation, the constitutional violation goes even deeper. That was the situation in *Lee*, 505 U.S. at 593-94, and that is the situation here. Students in the football crowd face the same "dilemma of participating, with all that implies, or protesting." *Id.* at 593. When all around them stand and attend to the prayer, it is perfectly obvious if one or a few do not. A dissenting student has "no real alternative which would have allowed her to avoid the fact or appearance of participation." *Id.* at 588.

A student in a football crowd may be subject to less regimentation from school authorities concerned about how the senior class appears to an audience, but he also receives less protection by school authorities from the reactions of those around him. The dispute over school-sponsored prayer has aroused intense feelings; these feelings may be combined with a crowd mentality, with excitement and rowdiness, and with frustration if the game goes badly. And unlike a graduating senior, who may conceivably leave at the end of the ceremony and never come back, one who visibly fails to pray at a football game has to keep going to school with those around him -- the next week, the next month, the next semester, possibly for as long as four more years. A student who visibly refused to participate in the prayer at a Santa Fe football game would risk "social ostracization and violence." *See supra* at 2. At least one student has been driven out of the Santa Fe schools by such harassment. Tr. 7/25/96 at 82-83. *Cf. Walter v. West Va. Bd. of Educ.*, 610 F.Supp. 1169, 1172 (S.D.W.Va. 1985)(student who was perceived not to have prayed during a classroom moment of silence harassed with anti-Semitic epithets).

B. Endorsement

The endorsement test, first elaborated in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984), was soon adopted in opinions of the Court. *County of Allegheny v. ACLU*, 492 U.S. 573, 589-94 (1989); *Wallace v. Jaffree*, 472 U.S. at 56 & n.42, 60-61; *see also Engel v. Vitale*, 370 U.S. at 436 (invalidating "governmental endorsement" of the New York Regents' prayer). Santa Fe violates the Establishment Clause if its "actual purpose is to endorse or disapprove of religion," or if, "irrespective of [its] actual purpose, [it] in fact conveys a message of endorsement or disapproval." *Wallace*, 472 U.S. at 56 n.42, quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

Santa Fe has endorsed the religious practice of prayer at school events under either standard. That is, Santa Fe's actual purpose was to endorse public prayer, and it actually conveyed a message that endorsed public prayer.

1. Purposeful Endorsement. Santa Fe adopted its Football Policy for the actual purpose of perpetuating prayer as part of the program at football games. No other purpose makes any sense of its actions. The school had long sponsored prayer at football and baseball games, and it had long supported sectarian religion within the school in other ways. There is no evidence of any change in Santa Fe's purpose, but only in its tactics. The historic purpose is presumed to continue forward absent clear evidence of a new purpose.[9]

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[9] This common-sense proposition is implicit in the Court's cases holding that where a defendant has abandoned unlawful conduct in the face of litigation, that defendant bears a "heavy burden" of showing that defendant will not resume the illegal conduct. *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, No. 98-822 (Jan. 12, 2000), (continued...)

No other claimed purpose plausibly fits the facts. Santa Fe's claimed purpose to solemnize football games could easily be achieved, without religious exercises, without controversy, and without litigation, by playing or singing the National Anthem -- an extraordinarily widespread custom at athletic events, deeply rooted in the culture -- or by any other patriotic observance, or by a secular message about good sportsmanship and fair competition. Santa Fe's insistence on creating an opportunity to solemnize the game with public prayer can only be understood in terms of a purpose to perpetuate public prayer at football games; it is wholly unnecessary to solemnization.

Santa Fe's claimed purpose to support student free speech is belied by the pervasive prior restraint it applies to student speech in every context except football games and graduations -- that is, in every context except those in which it is most determined to perpetuate public prayer as part of its official program. Its claimed purpose to support student free speech is also belied by its control over the entire event, its narrow limits on what the student speaker may say, and its rule that only one student per year will be permitted to speak.

The creator of the endorsement test has expressed confidence "that our courts are capable of distinguishing a sham secular purpose from a sincere one." *Wallace v. Jaffree*, 472 U.S. at 75 (O'Connor, J., concurring). This is an appropriate case for the Court to exercise that ability. The court of appeals concluded that the claimed secular purpose is a sham. Pet. App. A20. This conclusion was based on

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[9] (...continued)
slip op. at 18, and cases cited. The presumption that defendant might resume the illegal conduct necessarily entails a presumption of continuing purpose to do so, and that a continuing purpose may of course be manifested in slightly altered and allegedly lawful conduct.

the "evolutionary history" of the school's prayer policies, *id.* at A21, together with the policies' express preference for sectarian and proselytizing prayer. The inference that the claimed secular purpose is a sham is fully justified by the evidence, and by the duty of the courts of appeals and of this Court in First Amendment cases "to make a fresh examination of crucial facts" and decide for themselves "whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 567 (1995).[10]

2. Actual Message Of Endorsement. Whatever Santa Fe's actual purpose, it has unconstitutionally endorsed prayer at school events if it has conveyed a message of endorsement to a reasonable observer. "[T]he endorsement test necessarily focuses upon the perception of a reasonable, informed observer." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. at 773 (O'Connor, J., concurring). This observer "must be deemed aware of the history and context of the community and forum in which the religious display appears." *Id.* at 780.

Such an observer would thus know the history of the Santa Fe schools on football prayer in particular and on religion in the schools in general. He would know the polarization in the community and the outcome of past majority votes. He would know the school's limits on student free speech in all other contexts. He would know that there are readily available means to solemnize football games without making prayer part of the program.

Here, as in *Lee v. Weisman*, religious students are free to pray or otherwise express their religious feelings before

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[10] The district court held that the prayers were coercive, Pet. App. E8, and thus had no occasion to make a finding with respect to secular purpose or endorsement.

the game, after the game, or even during the game, provided only that they act individually or in voluntary groups. To exercise their freedom of speech and freedom of religion, individual students and voluntary groups do not need the school's public address system. They do not need the school board to call for elections, or the student council to conduct them. They do not need to hold the entire crowd as a captive audience for their prayer. Freedom of speech and free exercise of religion require none of these collective processes:

> Religious students cannot complain that omitting prayers from their [football games] would, in any realistic sense, "burden" their spiritual callings . . . . Because they accordingly have no need for the machinery of the State to affirm their beliefs, the government's sponsorship of prayer at the [football games] is most reasonably understood as an official endorsement of religion.

Lee v. Weisman, 505 U.S. at 629-30 (Souter, J., concurring).

In short, all the reasons that lead plaintiffs to argue that Santa Fe's actual purpose was to endorse Christian prayer would also lead the reasonable observer to perceive an actual endorsement. The difference between the purpose inquiry and the actual-message inquiry is that the purpose inquiry focuses on the state of mind of the state actors; the actual-message inquiry focuses on the state of mind of the hypothetical reasonable observer. Finding an actual purpose to endorse religion requires the Court to discredit the ostensible purpose; finding an actual message of endorsement requires no such thing. Where the government's conduct

> has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated. This is so not because of

> "transferred endorsement," or mistaken attribution of private speech to the State, but because the State's own actions . . . and their relationship to the private speech at issue, *actually convey* a message of endorsement.

Pinette, 515 U.S. at 777 (O'Connor, J., concurring)(emphasis in original).

Here the message of endorsement is actually conveyed. No reasonable observer, not blinded by commitment to the cause of perpetuating school prayer, could possibly conclude otherwise.

C. Preferential Access

Justice Scalia's opinion in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, partly for the Court and partly for a plurality, offered a third standard. This standard focused neither on the state of mind of the government actors, nor on the state of mind of the reasonable observer, but on the government's actual conduct. The plurality feared that even a reasonable observer might make a mistake, and it was unwilling to find a constitutional violation on the basis of a mistaken perception of endorsement, "at least where, as [in *Pinette*], the government has not fostered or encouraged the mistake." *Id.* at 766 (plurality). Nor did the plurality focus on the government's purpose.

Instead, both the Court and the plurality focused on whether the government had actually created an equal and open forum, or whether it had in fact preferred or assisted religious views. The religious display on the capitol grounds was protected private speech because:

> The State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same

terms required of other private groups.

Id. at 763 (opinion of the Court). None of those things are true here. Santa Fe sponsored the elected student's expression by creating the election process and delegating to the elected student a part of the program at an official school event, an event sponsored solely by the school and wholly subject to the school's control. The public address system at football games had *not* "been opened to the public for speech." And the elected student speaker did *not* request permission "through the same application process and on the same terms" as other groups; the elected student speaker used a unique process created solely for official school events and accessible to no other group.

The *Pinette* plurality elaborated additional objective evidence that religious speakers had received no preference: "Capitol Square is a genuinely public forum, is known to be a public forum, and has been widely used as a public forum for many, many years." *Id.* at 766. None of *these* facts exist in this case either. The public address system at football games, during pre-game ceremonies, is not a public forum, has never been known to be a public forum, and has never been used as a public forum. Moreover, the Court in *Pinette* took for granted that the multiple private groups with access to the forum were free to address their own agendas. But that is not true here either. The one speaker granted access is required to address the school's agenda.

Preferential access is unconstitutional not because of anyone's state of mind, but because it objectively prefers religious speech:

> Of course, giving sectarian religious speech preferential access to a forum . . . would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination). And one can conceive of a case in which a governmental entity manipulates its administration of a public forum . . . in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement *that is in fact accurate.* But those situations, which involve governmental *favoritism*, do not exist [in *Pinette*.]

Id. (emphasis in original).

In Santa Fe "those situations" do exist. There is favoritism, there is preferential access, the school did manipulate control of the microphone with an elaborate process to ensure that only one student would ever be permitted to speak, and that she would represent the views of the majority. In this case, the impression of endorsement is "in fact accurate."[11]

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[11] The *Pinette* plurality said only that such preferential access is unconstitutional for "*sectarian* religious speech." *Id.* (emphasis added). This limitation apparently preserved the position of the dissenters in *Lee*, three of whom were part of the plurality in *Pinette*, that government is free to open and close public ceremonies with "officially sponsored nondenominational" prayer. *Lee v. Weisman*, 505 U.S. at 641 (Scalia, J., dissenting).

We respectfully disagree. More important, this Court has consistently struck down religious observances in public schools even when they were nonsectarian in the sense specified by the *Lee* dissent. *Lee*, 505 U.S. at 590; *Wallace v. Jaffree*, 472 U.S. 38 (moment of silence with generic encouragement to prayer); *Engel v. Vitale*, 370 U.S. at 430 ("non-denominational" prayer). Note too that the prayers delivered at school events in Santa Fe, except when constrained by court order, have been sectarian in the sense described by the *Lee* dissent. *See* Stips. 37-39 at JA 39-40. The Football Policy states an express preference to permit prayer that is sectarian and proselytizing.

Moreover, the Fifth Circuit has tried the experiment of permitting nonsectarian prayer while forbidding sectarian prayer, and the experiment has failed. That experiment requires censorship of those invited to offer prayers. It requires courts, as Justice Souter predicted, to draw difficult lines and to engage in "comparative theology," *Lee*, 505 U.S. at 616 (Souter, J., concurring); *see* Pet. App. A36-A37; *id.* at B30-B31 (Jolly, (continued...)

D. The Lemon Test

Of course the Court's classic formulation of an Establishment Clause standard is the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In the context of government speech and government-sponsored speech, *Lemon*'s purpose prong has largely evolved into the question of "whether the government's actual purpose was to endorse or disapprove of religion," and *Lemon*'s effects prong has largely evolved into the question of "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *See Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring). Because we have already analyzed the issue under those labels, this section will be brief.

1. Lack Of Secular Purpose. Because the Football Policy has no secular purpose, it is unconstitutional under *Lemon v. Kurtzman*, 403 U.S. at 612. The one context in which this Court has repeatedly found no secular purpose is in attempts to teach or impose religion in the public schools. *See Edwards v. Aguillard*, 482 U.S. 578, 585-94 (1987); *Wallace v. Jaffree*, 472 U.S. at 56-61; *Stone v. Graham*, 449 U.S. at 40-41; *Epperson v. Arkansas*, 393 U.S. 97, 107-09 (1969).

2. Primary Effect. School-sponsored religious observances have the primary effect of advancing religion. A large audience, assembled by the state for other purposes, is required to listen to, and in every practical sense participate in, a state-sponsored religious exercise. Prayer is a quintessentially religious activity. Unless we are to assume that the prayers are a mere charade, or that they are wholly ineffectual, their primary effect cannot be other than religious. The Court has had few occasions to so hold only because it has so regularly struck down school-sponsored prayer because of its religious purpose, making it unnecessary to reach the question of effects, and because recent cases have made the point in terms of perceived endorsement rather than primary religious effect. *See Abington School Dist. v. Schempp*, 374 U.S. at 222-27 (stating the standard in terms of purpose and primary effect, and striking down school-sponsored prayer without distinguishing the two prongs of the standard).

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[11] (...continued)
J., dissenting). Thus, all parties to this case reject the distinction between sectarian and nonsectarian prayer.

III. LIMITS ON FACIAL CHALLENGES CANNOT SAVE SANTA FE'S FOOTBALL POLICY

Santa Fe's ultimate position, on which it relies at every turn, is that its Football Policy must be upheld because this case presents only a facial challenge to a policy that has never been implemented. Pet. Br. 11-12, 16-17, 21-26, 29, 31-35 & nn.12-13, 38-39, 42 n.16. Santa Fe asks this Court to ignore every fact known about this case, to consider only the bare words of the Football Policy, to rip those words from context, and to spin rosy scenarios about how the students might never vote for prayer.

This argument is wrong at multiple levels. The Football Policy is indeed facially unconstitutional. Moreover, this is not a pre-implementation challenge; there is enough evidence of initial implementation to support both facial and as-applied challenges. Finally, if Santa Fe's facial challenge argument were valid, school prayer policies could be effectively insulated from appellate review.

A. Santa Fe's Football Policy Is Unconstitutional On Its Face

The Football Policy was unconstitutional when the school board promulgated it, whether or not any student

ever delivered a prayer pursuant to the policy. The Football Policy is facially unconstitutional because it requires a public vote on the religious question of whether to pray at football games, and because it attempts to impose on the whole community a majoritarian resolution of that religious question. It is facially unconstitutional because it authorizes only a narrow range of possible messages, and singles out sectarian and proselytizing invocations for special mention within that narrow range. It is facially unconstitutional because its purpose was to encourage public prayer at official school events. It is facially unconstitutional because the policy itself, as originally promulgated and before any implementation, conveyed to a reasonable observer a message of endorsement of religion and of public prayer at official school events.

The restriction of the authorized messages, from the full English meaning of the word "message" to only those messages that are "consistent with the goals and purposes of this policy," appears on the face of the policy. The provision for only one annual election, so that only one student per year will be permitted to speak, appears on the face of the policy. That the election is to be conducted "upon advice and direction of the high school principal" appears on the face of the policy. That the policy applies only to "pregame ceremonies of home varsity football games" appears on the face of the policy; no implementation is required for the Court to know that these are official school events subject to the school's control except insofar as that control may have been delegated on the face of this policy. Santa Fe's desire to include "sectarian" and "proselytizing" messages appears on the face of the policy.

Moreover, a facial challenge is not an acontextual challenge. The reasonable observer in the endorsement test "must be deemed aware of the history and context of the community and forum." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. at 780 (O'Connor, J., concurring). This Court cannot pretend to be less informed than the hypothetical reasonable observer. A reasonable observer, or a reasonable judge, knowing the history of widespread support for religious observance in the Santa Fe schools, knowing that the Football Policy is inconsistent with the school's general policy on free speech, knowing that invocations are wholly unnecessary to solemnize a football game, would not have to await the outcome of student votes to understand the purpose of the policy or the message conveyed by the policy.

A reasonable observer informed about the community would also know the likely outcome of the student votes before they were ever taken, and would know that the school board also knew, and would know that the school board relied on that knowledge. This knowledge would reinforce the observer's already confident judgment about the policy's purpose and the message it conveyed.

The constitutional violation is complete when the school board acts with the forbidden religious purpose, or when it conveys the forbidden message of endorsement or disapproval of a religious practice. If the school board endorses prayer at football games, it has violated the Constitution even if the student body fails to act on the board's advice. It is irrelevant if Santa Fe turns out to be an incompetent endorser.[12]

Moreover, this is not a case in which the likelihood of continuing constitutional violations depends on any speculation about future bad-faith administration. The school board has set up a structure calculated to achieve the results it

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[12] *Cf. Reno v. Bossier Parish School Bd.*, No. 98-405 (Jan. 24, 2000), slip op. at 11 (noting that purpose test covers the "unlikely" possibility of the "incompetent retrogressor"); *id.* at slip op. 19 n.10 (Souter, J., dissenting in part)(describing the possibility as "rather paltry").

wants and then turned execution over to the students. The school need do nothing more, and the students need not act in bad faith; they have been told that in complete good faith they can vote for a message and for candidates who promise sectarian and proselytizing prayer.

In *Wallace v. Jaffree*, 472 U.S. 38 (1985), this Court struck down Alabama's moment of silence statute on its face, without evidence of how the law had been implemented.[13] The Court relied on the history of the provision, on the implausibility of possible secular purposes, and on its knowledge of the public schools. *Id.* at 56-61 & nn.42-51. Students would have been free to think whatever thoughts they chose during the moment of silence; there, as here, it was possible that no student would ever pray pursuant to the moment-of-silence statute. But the Court did not await proof of what the students had actually thought. The violation was complete when the legislature encouraged the students to pray, whatever the students actually did. Where government intends to convey a message of endorsement, it is "unnecessary" to inquire further. *Id.* at 61.

Similarly in *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982), involving a Louisiana statute that authorized prayer but did not require it, the Court struck the statute down prior to implementation. 653 F.2d at 902 ("The Jefferson Parish program has yet to be put into effect"). There too it might have happened that no student or teacher would choose to pray, in which case the program would default to a moment of silence that plaintiffs did not challenge. *Id.* at 899. The Court did not await proof of what actually happened, but struck the policy down because its purpose and primary effect could be determined

[13] There was evidence that plaintiffs' teachers had led the class in prayer after enactment of the statute, 472 U.S. at 44, but these prayers did not implement the moment-of-silence statute.

before any implementation.

On the free exercise side, the Court struck down Hialeah's animal sacrifice laws before any prosecutions had been brought, in an opinion that carefully dealt with context, enactment history, and application of the city's alleged policies to analogous activities. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520. There is ample precedent, and ample evidentiary basis, to hold Santa Fe's Football Policy unconstitutional on its face.

B. Santa Fe's Football Policy Is Unconstitutional As Applied

Plaintiffs also challenge the Football Policy as applied to the extent that evidence of the policy's implementation is available. The available evidence is substantial.

The record in this case shows that in May 1995, the students voted for prayer at graduation. In August 1995, the students voted for prayer at football games. These votes were the initial implementation of Santa Fe's new policy of letting students vote on prayer at school events. The cosmetic changes made to the policy in October, authorizing a vote on an "invocation and/or message" instead of a vote on an invocation, do not reduce the evidentiary force of these initial votes. The August version of the Football Policy produced prayer at football games, as the board had no doubt confidently expected, and those early votes increased the board's confidence that the amended version now in effect would work as expected in the future.

Moreover, we know that in 1999 the students again voted for a message at football games, and that they elected a student so determined to pray at football games that she filed her own lawsuit. She filed this lawsuit in the face of a squarely adverse prior decision from the court of appeals, and she somehow secured a temporary restraining order and preliminary injunction insuring her right to pray throughout

the 1999 football season. These facts are of record in related litigation against Santa Fe in the Southern District of Texas, and they are known to the whole community. They have been furnished to this Court by the student elected to give the prayers, filing as *amicus curiae* in support of Santa Fe. Brief for Marian Ward, App. C, D, F. In that brief, she insists on her constitutional right to deliver sectarian, proselytizing prayers over the public address system at Santa Fe football games. *Id.* at 28-29.

The judicial record does not document how the policy was implemented in 1996, 1997, or 1998. But that information is not essential. There is ample evidence that the policy worked from the beginning and works today exactly as Santa Fe intended. The school board's message did not fall on deaf ears; it was passed to willing hands.

C. Santa Fe's Argument Seeks To Insulate School Prayer Polices From Appellate Review

The full scope of Santa Fe's facial-challenge argument is breathtaking. When this lawsuit was filed, Santa Fe's practices with respect to religion in school were utterly indefensible. Santa Fe's lawyers immediately announced that the school was revising its policies. Tr. 5/5/95 at 21. They announced a new policy in August and implemented it for the 1995 season, requiring a student vote. They revised it again in October, requiring a vote on "invocation and/or message" instead of just an invocation.

It is apparently Santa Fe's position that the August policy and its implementation are irrelevant to the current policy, lacking even evidentiary value. Only this assumption makes any sense of its claim that this is "a pre-implementation facial challenge." Pet. Br. 22.

On that assumption, school boards can endlessly avoid appellate review by simply tinkering with their policies.

Write a new policy and make the past go away. Implement the new policy, change a few more words, and make the implementation go away. Change a few words after the evidentiary record is compiled and make the record go away. Appellate litigation cannot function on such a basis, and this Court's cases on facial challenges authorize no such thing.

Substantial changes to substantive policy undoubtedly change the question presented, although even then the earlier policy may remain relevant to questions of purpose and of the messages conveyed. But here, Santa Fe's changes are neither substantive nor substantial. The difference between the August 1995 policy and the current policy is little more than wordplay, yet Santa Fe claims that this change eliminates even the evidentiary value of the students' votes for prayer in 1995. Santa Fe cannot derive "such a variation in the result from so slight a change in form." *Smith v. Allwright*, 321 U.S. at 661.

Even if the Football Policy were thought to be in some sense facially neutral, that would not suffice. The Court's inquiry cannot "end with the text of the laws at issue . . . . The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. at 534. "[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. at 777 (O'Connor, J., concurring). Yet Santa Fe wants to hide behind a veneer of allegedly neutral words, which on close textual analysis are not really neutral, combined with its extraordinary theory of facial challenges. Santa Fe has had one continuous policy of perpetuating prayer as part of its official program at football games, assiduously pursued through increasingly refined means, but never departing from the original goal.

CONCLUSION

"The constitutional design is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." *Lee v. Weisman*, 505 U.S. at 589. A policy that requires an annual majority vote on a religious exercise plainly violates the design of the Constitution. That the invocation will be delivered in a public school, as part of the program at an official school event, compounds the violation. The portion of the judgment presented in the limited grant of *certiorari* should be affirmed.

Respectfully submitted,

Anthony P. Griffin
(Counsel of Record)
1115 Moody
Galveston, Texas 77550
(409) 763-4102

Douglas Laycock
4203 Woodway
Austin, Texas 78731
(512) 346-3127

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

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No. 99-62

IN THE

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

vs.

JANE DOE, individually and as next friend for her minor children Jane and John Doe, Minor Children; **JANE DOE #2**, individually and as next friend for her minor child, John Doe, Minor Child; and **JOHN DOE**, individually,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

JOHN G. STEPANOVICH
THOMAS P. MONAGHAN
STUART J. ROTH
JOHN P. TUSKEY
JOEL H. THORNTON
DAVID A. CORTMAN
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent Univ. Drive
Virginia Beach, VA 23464
(757) 226-2489

KELLY SHACKELFORD
509 Cutter Lane
Allen, TX 75013
(972) 423-8889

JAY ALAN SEKULOW*
COLBY M. MAY
JAMES M. HENDERSON, SR.
MARK N. TROOBNICK
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
Suite 609
1000 Thomas Jefferson St., NW
Washington, DC 20007
(202) 337-2273

PAUL D. CLEMENT
KING & SPALDING
1730 Pennsylvania Ave., NW
Washington, DC 20006
(202) 626-2640

**Counsel of Record*

Attorneys for the Petitioner

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ARGUMENT

The Santa Fe Football Policy is facially constitutional. This policy permits a student, at home football games, to give the message or invocation of that student's choosing. There is no vote on having a prayer. Prayer or other religious speech occurs, if at all, only as a consequence of the student speaker's independent choice. Respondents concede that if the speech of the student is not attributable to the school, there is no constitutional violation. *Infra* § II. Here, the student speaker's intervening, independent choice of what to say suffices alone to break any chain of attribution connecting the student's speech to the school district. Pet. Br. at 19-21, 28-29; *infra* § III. But Santa Fe goes even further to distance itself from the student speaker's speech. The student speaker is selected by a neutral process — first, students vote whether to have any speaker at all; next, if the vote is affirmative, any interested students can volunteer to serve as speaker; and third, students elect a speaker from among the volunteers. Pet. Br. at 9; Pet. App. at F1. Consequently, neither the possibility, nor the actuality, of a student speaker's inclusion of religious content or viewpoint in a pre-game speech, violates the Establishment Clause.

Petitioner Santa Fe has taken the proper constitutional course: selection of student speakers by neutral, secular criteria, and noninterference with the student speaker's decision whether to use secular or religious (or both) elements in a pre-game message. This middle course respects both students' free speech (and free exercise), *and* the non-establishment guarantee. *See* Pet. Br. § III; *infra* § III(D). Respondents' contrary arguments ultimately amount to a constitutional duty of schools to prevent the mere possibility of student-initiated religious speech. No such constitutional duty of censorship exists.

I. RESPONDENTS MAKE ONLY A FACIAL CHALLENGE TO THE SANTA FE FOOTBALL POLICY.

This case presents only a facial challenge to the Santa Fe Football Policy. Pet. Br. § I. As respondents concede, this challenge can succeed only if the Football Policy "was unconstitutional when the school board promulgated it, whether or not any student ever delivered a prayer pursuant to the policy." Resp. Br. at 43-44.

Respondents claim that they "also challenge the Football Policy *as applied to the extent that evidence of the policy's implementation is available*." Resp. Br. at 47 (emphasis added). On the contrary, no such challenge is properly before this Court.

First, respondents did not bring an as applied challenge to the Football Policy below. (Indeed, they could not, as the suit was filed prior to adoption and implementation of the current Football Policy.) Tellingly, respondents do not cite to their lower court briefs to demonstrate that respondents had brought an as applied challenge to the Football Policy. The district court stated that a ruling on the policy (i.e., facial constitutionality) would not preclude respondents from bringing an as applied challenge *in a future, different case*. Tr. 11/3/95 at 10-15; Tr. 5/10/96 at 13. *See* Pet. App. at E13 n.13 ("Should Plaintiffs or other interested parties feel that the *actual* policies of the School District differ from the newly *stated* policies in such a manner as to be violative of the Establishment Clause, a new cause of action may be commenced in a Court of competent jurisdiction") (emphasis added). On appeal, respondents did not contend that the district court erroneously failed to adjudicate the constitutionality of the Football Policy as applied. *See* Plaintiffs-Appellees/Cross-Appellants', Jane Doe, et al's [sic] Brief on Appeal, pp. 20-26.

Second, there is no record to support an "as applied" challenge to the Football Policy. Pet. Br. at 9 & n.7; *id.* at 16; *see also Doe v. Santa Fe Indep. School Dist.*, 168 F.3d 806, 810 n.3 (5th Cir. 1999). Respondents can only point to events predating the October, 1995 Football Policy, Resp. Br. at 47; *see also* Pet. Br. at 9 n.7, or to anecdotal material taken from amicus briefs, Resp. Br. at 5, 47-48.[1] Respondents themselves admit that "[t]he record in this case closed before the 1996 football season," *id.* at 5 — the first season which the (October 1995) Football Policy would govern — and that "[t]he judicial record does not document how the policy was implemented in 1996, 1997, or 1998," *id.* at 48. Nor is the 1999 season representative of the policy. *Supra* note 1.

Third, it would be fundamentally unfair to adjudicate an as applied challenge in such circumstances. Respondents cannot obtain a ruling here on an as applied challenge they neither brought nor preserved below. Petitioner would in any event be entitled to assemble a factual record in opposition to such a fact-based challenge. Reliance upon snippets taken from amicus briefs as evidence cannot substitute for a fully developed record. *Cf. Witters v. Washington Dep't of Servs. for*

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[1]The anecdotal material refers to the Fall 1999 football season. But this season came *after* the Fifth Circuit had issued its ruling of Feb. 26, 1999, invalidating the Football Policy. The 1999 season therefore operated under a policy of *no* religious messages. *See* Brief Amici Curiae for Marian Ward *et al.*, p. D1 (in wake of Fifth Circuit's decision, Santa Fe pre-game message guidelines banned "[p]rayers, blessings, invocations, and references to a deity"). Hence, even this anecdotal material demonstrates, not the operation of the Sante Fe Football Policy as written, but rather the untoward consequences of the Fifth Circuit's ruling requiring the *elimination* of religious speech by student speakers. (Respondents' misguided attempt to use the 1999 season as exemplifying the challenged policy, when in fact the policy had been struck down prior to that season, pointedly illustrates the danger of straying outside the record in this case.)

the Blind, 474 U.S. 481, 486 n.3 (1986) ("this Court must affirm or reverse upon the case as it appears in the record" and should not "consider claims that have not been the subject of factual development in earlier proceedings").[2]

II. RESPONDENTS DO NOT DISPUTE THE CONTROLLING CONSTITUTIONAL PREMISES.

"Both sides . . . agree that genuinely private religious speech is constitutionally protected." Resp. Br. at 9. "Protection for private religious speech protects individual choices." *Id.* Respondents concede the "'crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect,'" *id.* at 10 (quoting Petitioner's Brief, which in turn quotes *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (plurality)). Thus, respondents concede that this case turns on "the distinction between governmental and private prayer, which is fundamental to the First Amendment and which plaintiffs fully accept." Resp. Br. at 11 (footnote omitted).

Of course, the Santa Fe Football Policy authorizes, not "prayer," but a "statement or invocation," which may or may not include prayer. This distinction is important. *See infra* § III(B). But the critical point here is that respondents'

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[2]The sparse facts respondents identify do not in any event support an as applied challenge. For example, the fact that in 1999 the students "voted for a message at football games," Resp. Br. at 47, is constitutionally unproblematic. Likewise, the fact that the runner-up student, *see* Brief of Amici Curiae Marian Ward *et al.*, p. C2, was so determined to fend off censorship that she filed suit, Resp. Br. at 47, suggests not a school district that "is working desperately to preserve prayer," *id.* at 15, but rather a school district caught in the middle of competing constitutional claims "working desperately" to comply with the latest governing court order.

concessions of constitutional principle reduce their argument to one essential contention: that any potential religious speech by a student speaker at a school event is attributable to Santa Fe and therefore must be prohibited on pain of an Establishment Clause violation. If respondents cannot establish that proposition — and they cannot, *see infra* § III — respondents' challenge fails by its own terms.

III. A STUDENT'S SPEECH PURSUANT TO THE SANTA FE FOOTBALL POLICY IS NOT ATTRIBUTABLE TO THE SCHOOL DISTRICT.

The heart of respondents' case is the contention that any student speech under the Football Policy is attributable to the school district. In elaborating this theory, respondents urge three principal arguments for invalidating the Football Policy: first, Santa Fe's real purpose is to perpetuate student prayer at football games; second, the Football Policy permits a religious majority to force prayer on an objecting audience; and third, approving the Football Policy would open the doors to formal, student-led prayers in the classroom. As demonstrated below, these arguments fail.

A. The Santa Fe Football Policy Has a Legitimate Secular Purpose.

The Santa Fe Football Policy serves a legitimate secular purpose — indeed, several such purposes. Pet. Br. at 23-24.

Respondents object that a student speaker is "not needed" because other methods of solemnization are available. Resp. Br. at 10; *see also id.* at 36. The question, however, is not whether the Football Policy is *necessary*, but rather whether it is a *permissible* response to legitimate secular concerns. It is sufficient that a school may legitimately conclude that having a student speaker deliver a pre-game message or invocation will further the stated purposes of the policy. *See* Pet. Br. at 24; *see also Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor,

J., concurring) (where a governmental body "expresses a plausible secular purpose" for an enactment, "courts should generally defer to that stated intent").

Respondents would impugn Santa Fe's stated purposes by reference to the constitutional equivalent of "prior bad acts." Resp. Br. at 1-2, 12-13. There are several reasons, both factual and legal, for rejecting this argument.

In fact, Santa Fe was diligent in complying with, not evading, the governing constitutional law.[3] *See* Order Denying Attorney Fees (S.D. Tex. Dec. 13, 1996) (dkt. 65) at 3 (Santa Fe "went to great lengths to abolish unacceptable practices even before suit was filed, and it came, in the Court's view, into voluntary full compliance with applicable Fifth Circuit law *very* early in the case") (emphasis in original). *See also* Pet. Br. at 3-4; *id.* at 5 n.3.

The district court found, after trial, that "no Plaintiff has suffered a compensable injury because of any actions of the [Santa Fe] District." Pet. App. at D14. *See also* 168 F.3d at 824 (affirming denial of damages). The district court further found that the incidents respondents complained of were isolated, not authorized by Santa Fe, and promptly remedied by Santa Fe. *See* Pet. App. at D5-D15; *see, e.g., id.* at D5 (Santa Fe's response to incident "was prompt, sincere, and reasonably calculated to prevent future violations").

The district court found that Santa Fe had promptly enacted new policies to bring the school district into compliance with Establishment Clause precedent. Pet. App. at E4-E5, E11-E13. The district court concluded that "injunctive relief is not needed

[3]Indeed, Santa Fe has faced the accusation that it has been overzealous in deferring to court mandates, as demonstrated by the student lawsuit challenging Santa Fe's efforts to comply with the Fifth Circuit's ruling in this case. *See* Resp. Br. at 5; Brief Amicus Curiae of Marian Ward *et al.*

to ensure the School District's compliance with the Establishment Clause," *id.* at E12 (footnote omitted), and the court of appeals affirmed the denial of injunctive relief, 168 F.2d at 823. In short, Santa Fe has undertaken prompt, good faith compliance with legal directives.

As a legal matter, respondents' approach would make it difficult, if not impossible, to predict the constitutional consequences of action taken in the face of some prior history of violations. How, for example, could school officials predict when such unquantifiable factors as prior practices or the degree of religiosity among students will be regarded as "too much" for an otherwise permissible student speaker policy to pass constitutional muster?[4]

One way to avoid this problem would be to take respondents' approach to its logical conclusion — that is, to conclude simply, "Once a constitutional offender, always a constitutional offender." But that would be to say that a government body that has committed past Establishment Clause violations cannot correct itself. Any action the government body takes that touches on religion would be suspect,[5] no matter how neutral in reality that action is. It would be far

[4]Respondents would further complicate the analysis by asking how much free speech the school district allows to students in other contexts. Resp. Br. at 14. First of all, respondents are incorrect in portraying Santa Fe as hostile to student speech in general. *See, e.g.*, Stipulations Ex. 2 (Policy FMA) ("material that is merely offensive, unpopular, or that stimulates controversy shall not be restricted or forbidden"). Moreover, even leaving aside the complete unworkability of respondents' standard, there is no constitutional rule that says a school may only allow student free speech in one setting if it also allows it in others.

[5]Respondents' invocation of what "everyone" knows, *e.g.*, Resp. Br. at 19, seems little more than an appeal to the kind of stereotyping and regional prejudice that has no proper place in court.

better, and far more consistent with this Court's precedents, to apply the presumption that government actors are faithful to constitutional norms, *e.g.*, *Agostini v. Felton*, 521 U.S. 203, 226-27, 229, 234 (1997).

B. There is No Majoritarian Imposition of Prayer.

Respondents appear to be litigating a policy different from the one before the Court. Repeatedly, respondents attack a policy that authorizes a majority of students to "vote for prayer" at school events. Resp. Br. at 27. *See*, *e.g.*, *id.* at 8, 24, 50. The district court allowed Santa Fe to adopt such a policy, Pet. Br. at 3-4, 7-8, but Santa Fe ultimately chose a more expansive approach, permitting an "invocation and/or message," Pet. App. at F1; Pet. Br. at 3-4, 8. Thus, the Football Policy *does not entail a vote on whether to have a prayer*. Pet. Br. at 18; Pet. App. at F1. The only one who decides whether the student speaker's message will include a prayer is the individual student speaker. Pet. App. at F1 ("The *student volunteer* who is selected by his or her classmates *may decide what message and/or invocation to deliver*, consistent with the goals and purposes of this policy") (emphasis added). Neither the school district nor the student body makes that decision. This central fact renders irrelevant respondents' insistence that a majority vote cannot abrogate constitutional rights. Resp. Br. at 20-26.[6]

Respondents contend that the student speaker "will reliably represent the majority's views," Resp. Br. at 22. This contention is speculative and implausible. As anyone who has

[6]All that students vote for under the Football Policy is to have a student speaker at a school event. If it were unconstitutional to let a student address a school assembly because the speech the student utters might be religious, the federal courts would need to strike down policies permitting student talent shows, student club fairs, student government speeches, and virtually any other opportunity for students to address their assembled classmates.

been through high school should recall, student votes — such as student government elections — are at least as likely (perhaps more so) to reflect the elected student's admirable character, engaging personality, or sheer popularity, than any particular views.[7] In the present case, moreover, the district court forbade campaigning on school property, JA 31,[8] so it is even less likely than otherwise that the speaker's *views* will decide the election.

This is not a case in which the school district has gerrymandered the election to ensure prayer. On the contrary, Santa Fe explicitly ceded control over the student speaker's message to the elected student speaker. Pet. App. at F1 ("The student volunteer . . . may decide what message and/or invocation to deliver"); *see also* Pet. Br. at 9 & n.8; *Doe v. Santa Fe*, 168 F.3d at 812 (aside from the statement of purposes, terms of the Football Policy "provide no further guidance as to content"). Moreover, while the district court permitted Santa Fe to adopt a "prayer" policy, JA 42, Santa Fe deliberately chose the more expansive, more explicitly neutral course of allowing the student speaker, if any, to deliver an

[7]Furthermore, since any student *may* volunteer to be a speaker but no one *must* volunteer, there is no guarantee that *any* of the volunteer candidates will "reliably represent the majority's views." Nor is it at all clear that it even makes sense to speak of a "majority's views," when viewpoints come in as many distinct varieties as students do.

[8]Respondents point out that the district court's interim orders (e.g., against campaigning) are not, strictly speaking, part of the Football Policy and that, moreover, those orders are no longer in effect. Resp. Br. at 4 n.3. But the Football Policy was adopted to comply with the district court's directives, Pet. Br. at 3, and there is no reason to believe that, once the court orders were no longer in effect, the school district altered its practices. In any event, were that the case (and respondents do not allege that it is), it would be grist for an as applied challenge, not the present facial challenge.

"invocation *and/or message*." Pet. App. at F1. *See generally* Pet. Br. at 3-4, 7-8, 27-28 & n.11.

That the policy explicitly mentions an "invocation" as one possibility does not detract from this conclusion. Pet. Br. at 36-37. An invocation need not be religious, *see* Pet. at 12 n.6, but even if it were religious, merely listing prayer as one option does "not thereby encourage[] prayer over other specified alternatives," *Wallace v. Jaffree*, 472 U.S. at 73 (O'Connor, J., concurring in judgment). Santa Fe does not thereby "effectively favor the child who prays over the child who does not." *Id.*[9] When even the federal government perceives the need to distribute national guidelines assuring school officials that genuinely student-initiated speech may include religious contents or viewpoints, *see* Secretary's Statement on Religious Expression (and accompanying guidelines) (U.S. Dep't of Educ., Dec. 20, 1999) <www.ed.gov/speeches/08-1995/religion.html>, a school district is surely justified in spelling out, for the sake of clarity in an often confused area, that students may also pray when they are otherwise free to select their own message.

Respondents make much of the supposed narrowness of the student speaker's opportunity to speak. Resp. Br. at 17-18.[10] Respondents' premises are erroneous. There is hardly

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[9]*Accord* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 58-59 (1986) ("Use of the word 'prayer' should not be fatal in a statute that neutrally accomodates each student's right to private prayer").

[10]Respondents also emphasize that only one speaker has the floor for a given period. Resp. Br. at 11-12. The Football Policy on its face is not incompatible with a system whereby different students rotate as speakers for each of the home games. But even if only one student spoke at all of the (continued...)

anything "narrow" about the range of possible messages which, for example, "establish the appropriate environment for the competition." Pet. App. at F1. It is inaccurate to claim, as respondents do, that a "message questioning the existence of God . . . could not plausibly be connected to . . . any of the three authorized purposes of the invocation or message." Resp. Br. at 18.[11]

Moreover, there is nothing incompatible between topical limits on a speaking opportunity and the private speaker's ultimate personal responsibility for the message. Just because a governmental body imposes germaneness and time restrictions on private speakers does not convert speech from private to governmental. *E.g.*, *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976). *See Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (government may designate forum "for use by certain speakers, or for the discussion of certain subjects"); *id.* at 803 (citing *Madison Joint*

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[10](...continued)
games (there are "at least three to six" home games, JA 65 (Stipulation 125)), this would not distinguish the present case from other settings for genuinely free speech, such as a municipal stage featuring one production (or production company) for weeks at a time, *cf. Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), or a government plaza featuring a single display, *see Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 792-93 (1995) (Souter, J., concurring in part and concurring in judgment). The student speaker selection criteria are secular and content-neutral. It is not a matter of constitutional dimension whether the speaker is chosen by grade point average, first-come/first-serve, majority vote, or a lottery, to mention a few options.

[11]An atheist could compose a message exalting, for example, man's abandonment of the "shackles of religion" in favor of humanistic achievement reflected in the ideals of sportsmanship.

School District as example of designated forum).[12] A school may certainly *permit* a student to speak within the parameters of some germaneness limitations (such as sportsmanship, student safety, and the appropriate environment for competition) without transforming student speech into school district speech. For example, at a club fair, a school could instruct club representatives speaking in turn to confine their remarks to describing and promoting their clubs. The school would be no more responsible for the Fellowship of Christian Athletes' spiritual pitch than for the Young Republicans' political pitch.[13]

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[12]In *Madison Joint School District*, this Court recognized the free speech rights of a speaker from the audience who addressed a topic on the agenda of a school board's public meeting. That the speaker presumably was sharply limited by considerations of germaneness (the meeting agenda) and time (the speaker spoke for about 2½ minutes, 429 U.S. at 172) did not deter this Court from concluding that the private speaker had independent free speech rights.

[13]A limitation on the scope of permissible messages to those that promote sportsmanship is analogous to limitations on the permissible use of funds in cases like *Witters*. If respondents were correct, then the program in *Witters* could not have limited the use of aid to vocational education. But the Court did not find fault with that limitation, nor did it inquire whether too many of the permissible uses were religious. *Mueller v. Allen*, 463 U.S. 388 (1983), provides even stronger support. There, although the restrictions on the tax deductions meant that they primarily benefitted parents of students at religious schools, *see Witters*, 474 U.S. at 491 n.3 (Powell, J., concurring) ("Over 90% of the tax benefits in *Mueller* ultimately flowed to religious institutions"), the Court expressly rejected that as a basis for invalidating the statute, 463 U.S. at 401; *accord Agostini*, 521 U.S. at 229-30. These cases teach that as long as the restrictions on the purpose of the message (or the use of the funds) serve secular ends and do not foreclose the possibility of a secular message (or use), there is no Establishment Clause violation.

Nor does Santa Fe's control of the program as a whole make a difference. *Mergens* expressly rejected the argument that meetings pursuant to the Equal Access Act were unconstitutional because "the student religious meetings are held under school aegis." *Mergens*, 496 U.S. at 249. Respondents emphasize that Santa Fe "schedules the event," Resp. Br. at 15, but schools also set the time (and place) for noncurricular student clubs to meet. This does not make speech at the Bible Club attributable to the school. *See Mergens*. Respondents assert that Santa Fe "fully controls the pre-game ceremonies," Resp. Br. at 15, but this is inaccurate. Santa Fe does *not* control the student pre-game speaker's choice of content, *see* Pet. Br. at 9 & n.8, or even whether there is a student speaker at all, Pet. App. at F1. Respondents charge that Santa Fe "attracts the crowd" and "controls the public address system," Resp. Br. at 15, but the same is true for student government speeches, school talent shows, homecoming, senior proms, club fairs, and so forth. It is unreasonable to contend that all student speech at such events is attributable to the school district. On the contrary, it should be common knowledge that the class president delivers a speech which that student composed; that the student singer at a talent show selected the song (be it "The Impossible Dream" or "Amazing Grace"); that the representative of a student club speaks, not for the school, but for the club.[14] A school's control of the venue does not mean that the school controls the words a student speaks.

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[14]*See also* Laycock, *supra* note 9, at 41 ("That the orator represents the school in an inter-school competition does not make his speech an official school speech; many schools probably would deny endorsing the substantive positions taken by their contestants").

Respondents accuse Santa Fe of adopting an "express preference for sectarian and proselytizing prayer." Resp. Br. at 37; *see also id.* at 41 n.11. This is both wrong and unfair. The policy contains no such preference, express or implied. Respondents presumably extract this contention from Santa Fe's two-tiered approach, whereby Santa Fe included an *express prohibition* on sectarian and proselytizing speech only in its back-up version of the policy. *See* Pet. App. at F1-F2; Pet. Br. at 3, 9. But this two-tiered approach simply represented a prudent response to a legal dilemma. On the one hand, under Fifth Circuit precedent, a nonsectarian, nonproselytizing limitation appeared both permissible and, perhaps, obligatory. Pet. Br. at 3-5; *id.* at 6 n.4; *id.* at 7-8. The district court so concluded. Pet. App. at E11-E12. On the other hand, this Court had clearly condemned the imposition of such nonsectarian content and viewpoint restrictions on a private speaker. *Lee v. Weisman*, 505 U.S. 577, 589-90 (1992). Ironically, respondents agree that a nonsectarian, nonproselytizing restriction on private speakers, constitutionally, "makes no sense," Resp. Br. at 31, and would be unconstitutional, *id.* at 31, 41 n.11. Respondents, then, can hardly fault Santa Fe for choosing the constitutional course — "hands off" on content — while installing a back-up provision to comport with the peculiarities of Fifth Circuit precedent.

Respondents' contention that the Santa Fe Football Policy coerces both band members and students in the stands depends on the premise — refuted above — that any student "football prayers" given pursuant to the Football Policy "are attributable to the school." Resp. Br. at 31. Respondents do not appear to argue that there is any unconstitutional coercion if the prayers or messages given by individual students are attributable to the students, and for good reason. *Lee v. Weisman* expressed

concern over coercing students to participate in "a state-sponsored and state-directed religious exercise in a public school." But there is no unconstitutional coercion when religious speech results from (and is attributable to) the independent decisions of individual students. *See* Pet. Br. at 39-44. That is all that is involved here.

C. Approving the Football Policy Would Not Open the Doors to Classroom Prayer.

Respondents suggest that if this Court upholds the Santa Fe Football Policy then it necessarily must also approve student-led, student-initiated prayer in the classroom during the school day. Resp. Br. at 26-31. But the Football Policy does not apply to the classroom; indeed, other Santa Fe policies already prohibited prayer and other religious activities in the classrooms, *see* Pet. App. at D6, D9; Stipulations Exs. 1 (Policy EMI), 9 (Policy EMI (Local)). Furthermore, respondents' suggestion ignores both this Court's precedents and the unique characteristics of the classroom setting.

First, it is far too late in the day to suggest that context is irrelevant under the Establishment Clause. This Court repeatedly has emphasized the importance of context and the need for nuance in Establishment Clause analysis, especially in applying the endorsement test. *See, e.g., Lee v. Weisman*, 505 U.S. at 598 ("Our jurisprudence in this area is necessarily one of line drawing"); *accord Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring) (recognizing that the endorsement test may turn on "the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue"); *id.* at 788-90 (Souter, J., concurring); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) (noting that the Establishment

Clause "requires courts to draw lines, sometimes quite fine, based on the particular facts of each case").

In *County of Allegheny*, for example, the Court stated plainly that "the effect of a crèche display turns on its setting." *County of Allegheny v. ACLU*, 492 U.S. 573, 598 (1989). The Court concluded that a display on the Grand Staircase of the seat of county government raised more troubling questions than a display in a private park in a city's commercial district. *Id.* at 598-600 (distinguishing *Lynch v. Donnelly*, 465 U.S. 668 (1983)); *see also* 492 U.S. at 624-26 (O'Connor, J., concurring) (same). As Justice O'Connor underscored in her concurrence, "'[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.'" *Id.* at 624-25 (O'Connor, J., concurring) (*quoting Lynch*, 465 U.S. at 694 (O'Connor, J., concurring)).

Second, this Court specifically has noted the unique risks of endorsement and coercion in the classroom setting. More difficult issues arise when the questioned conduct occurs "as part of the curricular activities of students who are required by law to attend school." *School District of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963). In the classroom setting, compulsory attendance laws and small numbers magnify problems of coercion. Moreover, it is in the classroom that students routinely receive instruction from their teachers. *See also Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (noting the "students' emulation of teachers as role models"). The challenge of segregating out certain speech as purely private and the risk of mistakenly inferring government endorsement are greater in the classroom. Thus, *Mergens* emphasized that the Equal Access Act applied only to meetings held during "noninstructional time." *Mergens*, 496 U.S. at 251 (plurality).

By allowing student religious speech to take place in the same classrooms in which students received secular instruction only during noninstructional time, the Equal Access Act avoided any concerns with coercion or mistaken inferences of endorsement. *See id.*

The Santa Fe Football Policy puts even greater distance between any student religious speech that occurs and the classroom. It allows the possibility of such speech only at football games, which are separated from the classroom by time, space, and subject matter. A football game features large crowds with parents interspersed. Students sit in self-selected groups in the stands, and the event takes place long after the end of the school day. Although it remains a school event, the football game is an extracurricular event in an extracurricular setting during noninstructional time. On the spectrum of school-related events, a football game sits at one extreme, with the classroom at its polar opposite. For all these reasons, the football game poses far less risk of coercion and endorsement than the classroom.[15] As noted in *Mergens*, "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." 496 U.S. at 251.[16]

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[15]In its opening brief, petitioner pointed out the numerous factors that distinguish football games from the classroom. Pet. Br. at 34, 37-38, 41-42. Rather than refute these differences, respondents dismiss them as irrelevant. By failing to differentiate football games from classrooms, respondents demonstrate the breadth and rigidity of their position. By lumping together football games and physics class, Resp. Br. at 26-27, 30, respondents necessarily imply that all school functions pose identical risks of establishment and that all must be free from private religious expression.

[16]Respondents also suggest that the facts of *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274 (5th Cir.), *cert. denied*, 519 U.S. 965 (1996), (continued...)

D. Respondents' Theory of the Case is Rife with Constitutional Difficulty.

The unstated premise of respondents' theory — that any speech by a student speaker at a school event is attributable to the school district — not only is meritless, but raises a host of constitutional difficulties.

There is no principled limitation of respondents' theory to pre-game student speeches at high school football games. A football game is just one among many school events at which students may have an opportunity to address, in their own words, their assembled classmates (and others). The class president at a student government assembly, the student competitor at a school talent show, the student athlete at a school awards ceremony — all these, and others, enjoy a "moment in the sun" in which they alone command the podium or microphone and, for that brief moment, can individually express themselves. Respondents would presumably ban all such occasions because, after all, the student *might* voice a *religious* sentiment. The only alternative would be for the school strictly to censor any religious content and viewpoint from the student's speech. Yet respondents cannot reconcile the latter option with this Court's precedents shielding private speech from content and viewpoint censorship.

Imposing upon schools an affirmative duty to gag student religious speech at school events would force upon school

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[16](...continued)
somehow demonstrate the implications of upholding Santa Fe's Football Policy. Resp. Br. at 28-29. However, *Ingebretsen* involved a Mississippi statute that gave a blanket authorization for prayer in school, including prayer by teachers and school officials. The Fifth Circuit had no difficulty concluding that the statute violated the Establishment Clause. *See* 88 F.3d at 279-80. That result will not change if this Court upholds Santa Fe's Football Policy.

districts the intractable task of deciding what is and is not impermissible "religious" speech, a task unsuitable for any branch of government. *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981); *cf. Rosenberger*, 515 U.S. at 835-37. *See* Pet. Br. § III (outlining constitutional difficulties with discriminatory school censorship of student religious speech).

In essence, respondents' approach blurs the very distinction respondents concede is fundamental: between *government* speech and *private* (student) speech. Once that line is blurred, the challenge of complying simultaneously with the Establishment Clause (barring government *establishment* of religion) and the Free Speech and Free Exercise Clauses (barring government *suppression* of religious expression) becomes an administrative nightmare, if not a downright impossibility, for school districts. *See* Brief of Amici Curiae Spearman Independent School District *et al.* at 12-13. The far better approach — the one endorsed by this Court — is to uphold the "crucial difference" between government speech and private speech, *Mergens*, 496 U.S. at 250 (plurality). Adherence to that distinction allows school districts to follow a constitutionally permissible and readily identifiable middle course: neither *prescribing* nor *proscribing* student religious speech, but simply *allowing* such speech on equal terms with secular student speech.

CONCLUSION

This Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

John G. Stepanovich
Thomas P. Monaghan
Stuart J. Roth
John P. Tuskey
Joel H. Thornton
David A. Cortman
American Center for
Law & Justice
1000 Regent Univ. Drive
Virginia Beach, VA 23464
(757) 226-2489

Jay Alan Sekulow
Counsel of Record
Colby M. May
James M. Henderson, Sr.
Mark N. Troobnick
Walter M. Weber
American Center for
Law & Justice
Suite 609
1000 Thos. Jefferson St. NW
Washington, DC 20007
(202) 337-2273

Kelly Shackelford
509 Cutter Lane
Allen, TX 75013
(972) 423-8889

Paul D. Clement
King & Spalding
1730 Pennsylvania Ave. NW
Washington, DC 20006
(202) 626-2640

Attorneys for the Petitioner

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NO. 99-62

In The
SUPREME COURT OF THE UNITED STATES

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, Individually and as next of friend for her minor children, Jane and John Doe, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO INTERVENE BY MARIAN WARD

KELLY J. COGHLAN
Counsel of Record
COGHLAN & ASSOCIATES
505 Lanecrest, Suite One
Houston, TX 77024-6716
(713) 973-7475
Attorney for Marian Ward

App

MOTION FOR LEAVE TO INTERVENE BY MARIAN WARD

Pursuant to Rule 24, Federal Rules of Civil Procedure, Marian Ward respectfully requests leave to intervene and in support shows the following:

1. In the present case, Plaintiffs' Original Complaint against Santa Fe Independent School District was filed April, 1995.

2. At that time, Marian Ward was not in high school but was in the eighth grade. Marian Ward was not elected to give the pre-game football solemnizations until May, 1999 (subsequent to the Fifth Circuit's adverse ruling of February, 1999). From on or before April, 1995, to the present, Marian Ward has been enrolled and attending public schools in the Santa Fe Independent School District [hereinafter "SFISD"], and her parents have been taxpayers of SFISD. Marian Ward is presently eighteen years old, a senior enrolled in and attending Santa Fe High School, and living with her parents.

3. From the time the original suit in the present case was filed in 1995, until February 26, 1999 (the date the Fifth Circuit announced its' decision), the SFISD Football Policy had been interpreted by the federal court to permit student-led, student-initiated prayerful speech at Santa Fe High School football games.

4. It was not until February 26, 1999, that students of Santa Fe High School, including Marian Ward, for the first time lost their ability to have an elected student representative give a student-led, student-initiated prayerful message (on the same basis as a similar secular message) under the SFISD Football Policy. A few months later, Marian Ward became the student representative elected to give a message under the Football Policy—being the first

such student after the Fifth Circuit's adverse ruling in the present case.

5. In May, 1999, Stephanie Vega and Marian Ward (as alternate runner-up) were elected by their peers to deliver football pre-game messages for the 1999/2000 school year. At the time of Stephanie Vega's and Marian Ward's selection, the Petition For Writ Of Certiorari in this case was still pending. Therefore, no one could effectively intervene in the present case at that time.

6. On August 25, 1999, as a result of a threat from the Superintendent of SFISD, Stephanie Vega resigned as the student representative, and Marian Ward took her place as the elected alternate runner-up. Soon thereafter, Marian Ward began encountering similar and increasingly hostile and intimidating pressure and threats from SFISD school officials. *See* Brief *Amici Curiae* For Marian Ward And Other Students And Parents Of Santa Fe Independent School District In Support Of Petitioner [hereinafter "*Amici* Brief"] at 2-3 & n.6; *see also* App. C and D to *Amici* Brief.

7. On September 2, 1999, Marian Ward filed suit against SFISD: *Ward v. Santa Fe Indep. Sch. Dist.*, No. 99-CV-556 (D. Tex. filed Sept. 2, 1999) [hereinafter "*Ward v. Santa Fe*"]. At that time, Marian Ward could not effectively intervene in the present case since the Petition For Writ of Certiorari was still pending.

8. Certiorari was granted in the present case on November 15, 1999.

9. It was not until November 15, 1999, that Marian Ward had the first possible opportunity to intervene in the present case after becoming the student representative elected to deliver a pre-game message under the Football Policy and since filing suit against SFISD.

10. Marian Ward participated in filing with this Court a Motion For Leave To Participate In Oral Argument As *Amici*

Curiae And For Additional Time For Oral Argument [hereinafter "Motion To Participate"], believing that the granting of the Motion would allow her attorney to address and protect her legal interests, as well as those of the other 158 SFISD *Amici* students and parents with similar interests. The Motion To Participate was denied, with notice of ruling received by Ward's counsel via mail on January 27, 2000. It was at this point that Marian Ward became aware that the only recourse left to protect her legal interests was through intervention. This is the point at which Marian Ward knew that her "interests...would no longer be protected" except through intervention. *United Airlines v. McDonald*, 432 U.S. 385, 394 (1977). Marian Ward filed this Motion For Leave To Intervene promptly upon receiving notice of the denial of the Motion To Participate.

11. Under the particular circumstances of this case, application to intervene is being timely made by Marian Ward. *See NAACP v. New York*, 413 U.S. 345, 366 (1973) ("Timeliness is to be determined from all the circumstances"). Marian Ward claims an interest relating to the subject of this action and is so situated that the disposition of the action may, as a practical matter, impair Marian Ward's ability to protect her interests--since a final decision in this case may be dispositive of Marian Ward's rights and interests in *Ward v. Santa Fe*.

12. The legal interests of Marian Ward, contrasted with the legal interests of Petitioner, differ--as a matter of law. The focus of the attorneys for SFISD is necessarily upon defending SFISD's football policy as not violating the Establishment Clause. The attorneys for the school district (as with all governmental bodies) must represent the broad public interest, not just the concerns of a single student, such as Marian Ward. *See Sierra Club v. Epsy*, 18 F.3d 1202,1208 (5th Cir. 1994) ("The government must represent the broad public interest, not just the concerns of [one]"). The interests and claims of Marian Ward, on the other hand,

are as to her legal abilities as a student citizen to exercise her personal liberties granted her under the First and Fourteenth Amendments, without governmental interference. These issues should be heard and considered together since a decision on the former will likely be a decision on the latter.

13. The necessity of the litigation of *Ward v. Santa Fe* demonstrates the dichotomy and divergence of legal interests between SFISD and Marian Ward. SFISD's actions made it necessary for Marian Ward to file suit against SFISD on September 2, 1999, for alleged violations of the Establishment Clause and Ward's constitutional rights. *See* App. C to *Amici* Brief (Affidavit of Marian Ward filed with the Original Complaint); *see also* App. D to *Amici* Brief. On September 3, 1999, Marian Ward was granted a Temporary Restraining Order against SFISD, and on October 6, 1999, Marian Ward was granted a Preliminary Injunction against SFISD. *See* App. F of *Amici* Brief containing the transcript of the federal district court's ruling on Plaintiff's Application for Temporary Restraining Order, a copy of the Temporary Restraining Order, and a copy of the Preliminary Injunction in *Ward v. Santa Fe*.

14. The attorneys for SFISD do not represent Marian Ward, nor can they. With the pending case of *Ward v. Santa Fe Indep. Sch. Dist.*, No. 99-CV-556 (D. Tex. filed Sept 2, 1999) [hereinafter "*Ward*"], and with Marian Ward as an adverse party to SFISD in such litigation, there is a legal conflict of interest between Marian Ward and SFISD.

15. The well known legal abilities of Petitioner's counsel are not being questioned in the slightest respect. But, due to the litigation in *Ward v. Santa Fe* and the inherent divergence of legal interests between SFISD (as a school district) and Marian Ward (as the student elected to solemnize school events under the Football Policy), it is improbable, if not impossible, for SFISD's attorneys to fully be able to represent the legal interests of Marian Ward for

the reasons stated herein. *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) ("The requirement of the Rule is satisfied if the applicant shows that representation of his interests 'may be' inadequate; and the burden of making that showing should be treated as minimal").

16. A decision on the merits in the present case may be dispositive of Marian Ward's claims and rights in *Ward v. Santa Fe*. "[T]he *stare decisis* effect of an adverse judgment constitutes a sufficient impairment to compel intervention." *Sierra Club v. Glickmann*, 82 F.3d 106, 109-10 (5th Cir. 1996).

17. Neither party will be prejudiced by the intervention of Marian Ward. Federal courts should allow intervention "where no one would be hurt and greater justice could be attained." *Sierra Club v. Epsy*, 18 F.3d at 1205.

PRAYER

For these reasons, Marian Ward requests leave to intervene.

Respectfully submitted,

KELLY J. COGHLAN
Counsel of Record
COGHLAN & ASSOCIATES
505 Lanecrest, Suite One
Houston, TX 77024-6716
(713) 973-7475
Attorney for Marian Ward

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SANTA FE INDEPENDENT SCHOOL DISTRICT,

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JANE DOE, *et al.*,

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

ANTHONY P. GRIFFIN
(Counsel of Record)
1115 Moody
Galveston, TX 77550
(409) 763-0386

DOUGLAS LAYCOCK
4203 Woodway
Austin, TX 78731
(512) 346-3127

STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUMMARY OF ARGUMENT

On March 22, this Court decided *Board of Regents v. Southworth*, No. 98-1189. Plaintiffs file this Supplemental Brief to review *Southworth*'s implications for this case.

Southworth rejects two central pillars of Santa Fe's argument – its claim that student referenda are a neutral means of selecting speakers, and its claim that on a facial challenge the Court must assume everything in favor of the government, no matter how unrealistic. *Southworth* also clarifies the relationship between government speech on the one hand, and private speech supported or subsidized by government on the other.

If the student elected to give the invocation or message is a government speaker, as plaintiffs have argued, then all sides agree that she cannot lead the crowd in prayer. If she is a wholly private speaker, as Santa Fe claims, then she must be selected in a viewpoint-neutral manner, because the school gives her substantial assistance in delivering her message to a state-assembled audience. But *Southworth* holds that a student election to decide who gets to speak is not a viewpoint-neutral selection process. Either way – as a government speaker or as a private speaker with exclusive access to the public address system – it is unconstitutional for an elected speaker to lead the crowd in prayer.

Southworth rejected the student referendum on a facial challenge. The Court did not assume that students would vote on speakers without regard to the speakers' viewpoint, and it did not hold that courts could review only the outcome of particular votes instead of reviewing the choice to commit constitutional rights to a student vote in the first place. Rather, the Court reviewed the referendum procedure on its face, and it assumed that a majority vote would reflect the majority's viewpoint – which is of course what referenda are designed to do.

ARGUMENT

I. *Southworth* Holds That a Student Referendum Is Not a Neutral Means of Selecting Speakers.

Santa Fe conducts student referenda first to decide whether to authorize a student to deliver an invocation or message in its pre-game ceremonies, and then to select the student to give the invocation or message. Plaintiffs have contended that these referenda do not privatize the resulting prayers, and that a referendum on whether to authorize prayer is itself an unconstitutional feature of Santa Fe's Football Policy. Resp. Br. 20-26.

Santa Fe contends that the football prayers are private student speech. It also contends, more by assumption than by argument, that the student referenda are a constitutionally neutral method of deciding whether to authorize prayer and of selecting the student speaker to deliver the invocation or message. Pet. Br. 18.

Southworth rejected Santa Fe's contention that a student referendum is a viewpoint-neutral method of selecting the student speaker. *Southworth* thus made clear that the football prayers are unconstitutional even if they are somehow characterized as private speech. For at the very least, the student speaker who delivers the prayers is given exclusive speaking privileges by the school, and a private speaker who gets these exclusive privileges must be selected in a viewpoint-neutral process. Santa Fe has not claimed otherwise; it contends that its process is neutral. But *Southworth* held that a student referendum is not neutral. A student referendum is designed to vindicate the view of the majority, while "the whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." Slip op. at 16.

We are not here concerned with election of public officials or student leaders to perform many diverse tasks over a period of time, only some of which involve speech. This case, like *Southworth*, involves referenda that directly

and primarily allocate a government-assisted opportunity to speak. The student referenda in *Southworth* were like the second of the two elections in each annual sequence in Santa Fe: Each is an election to choose speakers for special government benefits. Students in *Southworth* voted to fund some speakers and to defund other speakers; students in Santa Fe vote to give one speaker exclusive access to the stadium public address system for the purpose of giving an invocation or message, and vote to deny that access to all other speakers.

Because referenda allocating the right to speak are not viewpoint neutral, characterization of the football prayers as private speech would mean that they violate the Free Speech Clause as well as the Establishment Clause. Santa Fe's football prayers would violate the Free Speech Clause because they give exclusive speech rights to one student, and that student is selected by a process that is not viewpoint neutral. The football prayers would also violate the Establishment Clause, because it is settled that religious speech cannot be granted preferential access to public property. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion).

Santa Fe's defense – that no viewpoint is given preferential access because the student referendum is a neutral selection process – is precisely the defense that *Southworth* rejected:

> We do not sustain . . . the student referendum mechanism of the University's program, which appears to permit the exaction of fees in violation of the viewpoint neutrality principle.

Id. at 2.

> The student referendum aspect of the program for funding speech and expressive activities, however, appears to be inconsistent with the viewpoint neutrality requirement.

Id. at 11.

> To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as majority views.

Id. at 16.

Because the student referendum in this case is not a viewpoint-neutral process, it cannot justify Santa Fe's grant of exclusive speech rights to one student who leads a prayer in the school's pre-game ceremonies.

II. *Southworth* Clarifies That the Football Prayers Are Unconstitutional Whether Characterized as Governmental or Private.

In our principal brief, we argued that private prayer is constitutionally protected, that government prayer is constitutionally forbidden, and that many factors combine to make Santa Fe's football prayers governmental. Resp. Br. at 10-26. One of the factors that independently supported this conclusion was preferential access to the public address system. *Id.* at 39-41. Granting preferential access to public facilities is a form of government endorsement that violates the Establishment Clause; we still believe that is the simplest analysis of this case.

However, *Southworth* highlighted an alternative way to analyze such issues. *Southworth* recognized a category of government-assisted private speech, and it recognized constitutional rules for the award of such government assistance. If Santa Fe's football prayers are private but government assisted, they violate *Southworth*, because the government assistance is awarded on a basis that is not viewpoint neutral.

Southworth involved a university program to assist student speech with financial subsidies. The Court began with the distinction at issue here: the familiar distinction between government speech and private speech. Slip op.

at 9-10. The University insisted that the subsidized speech was private, not governmental. Like Santa Fe here, the University attributed the disputed speech to the students:

> The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors.

Id. at 10.

This characterization was credible, and apparently uncontested on the facts of *Southworth*, because the University subsidized a wide range of speakers on a viewpoint-neutral basis. *Id.* at 4-6. Accepting this characterization, the Court turned to the constitutional standard applicable to private speech subsidized by the University. *Southworth* held that if a university subsidizes private speech without making that speech its own, the subsidized private speakers must be selected in a manner that is viewpoint neutral:

> The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support. . . . When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others.

Id. at 14.

This case does not involve mandatory student fees, but rather preferential access to a speaking opportunity at an official school event. Instead of many speakers being awarded financial subsidies, one speaker is awarded exclusive access to the public address system at a crowded football stadium. The same principles apply to both cases. Access to public, limited, or even nonpublic

fora must be granted on a viewpoint-neutral basis,[1] and all the equal access cases have stated or implied that preferential access for religious speech violates the Establishment Clause.[2] Indeed, *Southworth* expressly derived its viewpoint-neutrality requirement for financial subsidies from the pre-existing viewpoint-neutrality requirement for access to public property. Slip op. at 10. "Access to a public forum, for instance, does not depend upon majoritarian consent." *Id.* at 16-17. Santa Fe does not dispute the requirement of viewpoint neutrality in granting speakers access to its property; its defense is that there is no preferential access, because the one specially privileged speaker is selected through a viewpoint-neutral process.

Even if Santa Fe's football prayers are private, they plainly get government assistance in the form of exclusive access to the public address system. If the prayers are private, they are, like the subsidized speech in *Southworth*, private speech with government assistance. And this assistance is awarded through a student referendum, which is not a viewpoint-neutral process.

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[1] *See, e.g., Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 834 (1995) ("the University may not discriminate based on the viewpoint of private persons whose speech it facilitates"); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-93 (1993) ("control over access to a nonpublic forum" must be viewpoint neutral).

[2] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) ("preferential access . . . would violate the Establishment Clause (as well as the Free Speech Clause)) (plurality opinion); *Board of Educ. v. Mergens*, 496 U.S. 226, 252 (1990) (school that permits religious club to meet, "just as it permits any other student group to do, does not convey a message of state approval or endorsement") (plurality opinion); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) ("forum is available to a broad class of nonreligious as well as religious speakers").

Santa Fe is thus left with two possibilities. If the prayers are governmental, all parties agree that they violate the Establishment Clause. If the prayers are private, they violate the Establishment Clause and the Free Speech Clause, because Santa Fe awards government assistance to religious speech through a student referendum, a process rejected in *Southworth*.

This analysis does not mean that there can never be a private speaker at an official school event, nor does it mean that there can never be an elected speaker at an official school event. It does mean that wholly private speakers cannot be elected for the sole purpose of speaking, and that speakers so elected cannot be wholly private. Private speakers given preferential access must be selected on viewpoint-neutral criteria, and winning an election is not such a criterion. It follows that an *elected* speaker with government support or preferential access must be treated as a state actor, or at least that her speech is subject to constitutional scrutiny because of the state action in directing the election and in granting special privileges to the winner. If a speaker wishes to remain a wholly private speaker with government assistance, *Southworth* says that she cannot be elected.

Elected speakers do not acquire free speech rights by virtue of their election, because a majority cannot award special free speech rights to selected speakers. The government may voluntarily accord broad discretion to such speakers, but it cannot authorize them to say things that the government could not constitutionally say itself.

Nor does this analysis mean that there can never be religious speech at a school event. But for such speech to be consistent with the neutrality requirements of the Free Speech and Establishment Clauses, it must be the

incidental result of a viewpoint-neutral process, such as a forum open to multiple speakers with a diverse array of views.[3]

III. *Southworth* Invalidated the Student Referenda on a Facial Challenge.

A centerpiece of Santa Fe's case is its claim that this is only a facial challenge, that the Court must therefore ignore everything that has actually happened in Santa Fe, and that it must indulge the most optimistic assumptions counsel can devise about what might happen in the future. *Southworth* implicitly rejects that argument.

Although the fact drew little comment in the opinion, *Southworth* was a facial challenge to the University's policy. The opinion upheld "the University's program in its basic structure." Slip op. at 15. The opinion describes no challenge to a particular vote or a particular funding decision; it describes a challenge to the program as a whole. This was a facial challenge, although that term was not used.

In the context of this facial challenge, the Court concluded that the referendum procedure was almost certainly invalid. The issue had to be remanded, because the record was so undeveloped that the Court appeared to be

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[3] In communities with a sufficiently large majority of a single religious faith (or a cluster of similar faiths), even a viewpoint-neutral selection system may result in religious domination of the government-assisted opportunity to speak. In such a case, the Court would have occasion to apply its earlier statements that religious domination of even a formally neutral forum can violate the Establishment Clause. *See Rosenberger*, 515 U.S. at 850-51 (O'Connor, J., concurring); *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring); *Widmar*, 454 U.S. at 275. This case is easier, because religious domination of the opportunity to speak at football games results from a non-neutral selection process, deliberately designed to yield the religious domination that has resulted.

somewhat uncertain whether a student organization could be funded or defunded by a student vote. *Id.* at 16. And the Court left open the possibility that the referendum process might be subordinated to some protection for viewpoint neutrality. *Id.* But there is not the slightest hint that the Court assumed that the students might vote on a viewpoint-neutral basis, or that the lower court on remand should review only the outcome of individual votes and not invalidate the referendum process on its face.

Unlike an administrative agency, which can be subjected to binding criteria and judicial review, voters have unbounded discretion. Unbounded discretion in awarding speech rights is always subject to facial challenge as an unconstitutional basis for selecting among private speakers. *See, e.g., City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750 (1988). *Southworth* assumes on a facial challenge that the majority will vote its own preferences.

Even before *Southworth*, Santa Fe had all but conceded that a student referendum on prayer at football games would be unconstitutional. Reply Br. at 8. It claims only that the students do not vote directly on whether to have prayer, and that they might elect a football speaker without regard to her views on prayer at football games. *Id.* at 8-9. Santa Fe asks the Court to assume that students might vote on popularity or other grounds unrelated to the issue of prayer at football games. *Southworth* implicitly rejects this implausible claim. *Southworth* assumes that student referenda will represent the view of the majority; that is what referenda are designed to do.[4]

Students may vote on grounds of popularity when electing a student council officer to a position with limited and diverse responsibilities after a campaign with few or no serious issues. Santa Fe invokes high school memories of such elections, Reply Br. at 8-9, but that

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[4] Santa Fe also fails to explain how popularity could be a viewpoint-neutral criterion. A student with unpopular views is unlikely to be popular.

memory is not this case. Santa Fe students elect a representative to perform a single task – to deliver the invocation or refuse to deliver the invocation – and they conduct these elections in the midst of a bitter and protracted public dispute over invocations. It is absurd to assume that students will ignore the one squarely presented issue and vote without regard to whether they want an invocation. The results of the several Santa Fe elections in the judicial record confirm that students persistently elect a speaker who will deliver an invocation. Resp. Br. 4-5, 23. With or without a record, *Southworth* holds that the risk of such voting behavior is too great to permit referenda to award special privileges to private speakers, and that such a process should be invalidated on a facial challenge.

CONCLUSION

Southworth is fully consistent with the argument in plaintiffs' principal brief, and it rejects essential premises of the argument in Santa Fe's briefs. For these additional reasons, as well as the related reasons stated in our principal brief, the portion of the judgment presented in the limited grant of *certiorari* should be affirmed.

Respectfully submitted,

DOUGLAS LAYCOCK
4203 Woodway
Austin, TX 78731
(512) 346-3127

ANTHONY P. GRIFFIN
(Counsel of Record)
1115 Moody
Galveston, TX 77550
(409) 763-0386

STEVEN R. SHAPIRO
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

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IN THE

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

vs.

JANE DOE, individually and as next friend for her minor children Jane and John Doe, Minor Children; **JANE DOE #2**, individually and as next friend for her minor child, John Doe, Minor Child; and **JOHN DOE**, individually,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

JOHN G. STEPANOVICH
THOMAS P. MONAGHAN
STUART J. ROTH
JOHN P. TUSKEY
JOEL H. THORNTON
DAVID A. CORTMAN
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent Univ. Drive
Virginia Beach, VA 23464
(757) 226-2489

KELLY SHACKELFORD
509 Cutter Lane
Allen, TX 75013
(972) 423-8889

JAY ALAN SEKULOW*
COLBY M. MAY
JAMES M. HENDERSON, SR.
MARK N. TROOBNICK
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
Suite 609
1000 Thomas Jefferson St., NW
Washington, DC 20007
(202) 337-2273

PAUL D. CLEMENT
KING & SPALDING
1730 Pennsylvania Ave., NW
Washington, DC 20006
(202) 626-2640

**Counsel of Record*

Attorneys for the Petitioner

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ARGUMENT

This supplemental brief addresses the implications for the present case of this Court's decision in *Board of Regents v. Southworth*, No. 98-1189 (U.S. Mar. 22, 2000). The *Southworth* decision, while largely inapposite to the present case, supports several principles underlying the Santa Fe Football Policy. Contrary to respondents' contentions, *Southworth* does not undercut the constitutionality of the Santa Fe Policy, but rather reinforces it.

Respondents seize upon *Southworth* as supposedly rejecting "two central pillars of Santa Fe's argument," Supplemental Brief for Respondents (Resp. Supp. Br.) at 1. Respondents are mistaken. In fact, their facile overreading of *Southworth* illustrates the flaws of respondents' arguments in this case. *Infra* § II.

As an initial matter, it must be acknowledged that *Southworth* and the present case proceeded under quite distinct legal theories. *Southworth* involved a free speech challenge; the present case involves an Establishment Clause challenge. *Southworth* involved compulsory funding of speech; here, no funding is at issue. *Southworth* entailed a challenge to objectionable uses of student fees; the case at bar entails a facial challenge to a speaker policy, regardless of what the student speakers say.[1] Thus, any comparison between

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[1] Respondents suggest that *Southworth* modified *sub silentio* the standards governing facial challenges. Resp. Supp. Br. § III. This is inaccurate. First, as respondents concede, the facial standard issue "drew little comment in the opinion." *Id.* at 8. This is an understatement. The opinion is entirely silent on whether the case presented a facial or as applied challenge. Of course, even if the Court had addressed the issue and applied a less demanding standard to plaintiffs' free speech challenge, that conclusion would have no force outside the free speech context, where the Court has long applied a less demanding standard in facial challenges. *See, e.g., Secretary of State v. J. H. Munson Co.*, 467 U.S. 847 (1984). Respondents' contention ultimately reduces to the proposition that the Court took the opportunity in a free speech case to overrule *sub silentio* this Court's rule that "[i]t has not been the Court's practice, in considering facial challenges to statutes . . ., to strike them down in anticipation that a particular

(continued...)

Southworth and the present case will necessarily be somewhat remote.

Despite these necessary limitations on any such comparison, *Southworth* does underscore the constitutionality of the Santa Fe Football Policy in several respects.

First, *Southworth* reaffirms the importance of government acting in a viewpoint-neutral manner toward private speech. Slip op. at 11, 14-15. The attempt by respondents to impose on school districts a duty to censor out the religious speech of student speakers, *see* Pet. Br. § III; Reply Br. § III(D), flies in the face of this admonition.

Second, *Southworth* reaffirms the importance of deferring to educational institutions regarding the pursuit of their educational missions. Slip op. at 13-14. If universities can decide that it promotes education to allow students free speech, give them the money for that speech, and involve students in the process of distributing that money, *id.*, Santa Fe can certainly decide that it furthers student education to involve students in the process of delivering a pregame message or invocation.

Third, as set forth in greater detail below, *infra* § I, *Southworth* reaffirms that student-initiated, student-led speech is *private* speech, not government speech, even if the school provides both the setting and the funding for the speech.

I. *Southworth* Underscores that the Santa Fe Policy Involves Private Speech, Not Government Speech.

All parties agree that there is a "crucial difference between government speech endorsing religion, which the Establishment Clause prohibits, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality); *see*,

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[1](...continued)
application may result in unconstitutional [action]." *Bowen v. Kendrick*, 487 U.S. 589, 612 (1988) (*quoting Roemer v. Board of Public Works*, 426 U.S. 736, 761 (1976) (plurality)).

e.g., Resp. Br. at 9-10. The critical question that divides the parties is whether the speech permitted under Santa Fe's Football Policy is student speech or government speech. This Court's recent decision in *Southworth* bolsters the conclusion that the Santa Fe Football Policy involves student, not government, speech.

The student reimbursement policy at issue in *Southworth* featured far greater government involvement in student speech and far greater risks of perceived government endorsement of the resulting speech. In *Southworth*, the student government forwarded its funding decisions "to the chancellor and to the board of regents for their review and approval." Slip op. at 5-6. The University also "regulat[ed] the conduct and activities of" student organizations. *Id.* at 7. Exact comparisons are difficult because Santa Fe's Football Policy is so different from *Southworth*'s compelled funding program. For example, under the Football Policy, student decisions as to whether to have a speaker, which student will speak, and what the individual student will say all rest exclusively with students and are not subject to school "review and approval."

In addition, *Southworth* involved government funding of speech, which raises unique risks of endorsement. Recognizing these concerns, Justice O'Connor emphasized that *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), involved more than just a straightforward application of cases, like *Mergens*, involving only access for speech. *See* 515 U.S. at 846-48 (O'Connor, J., concurring). This case, like *Mergens*, but unlike *Rosenberger* and *Southworth*, involves the easier context of speech only. No funding is at issue.

Even though *Southworth* featured government funding and pervasive school involvement, this Court emphasized, without equivocation, that the resulting speech "is not that of the University or its agents." Slip op. at 16. This was no mere dictum. That the case featured student rather than University speech determined the nature of the Court's inquiry. *See id.* at 10.

Although the University encouraged the speech, regulated the student clubs, and ultimately reimbursed students for the cost of their speech, the resulting student speech was not transformed into government speech through the kind of alchemy advocated by respondents. Instead, the Court reaffirmed that government speech retains its commonsense definition. If government officials "were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." *Id.* That was not the case in *Southworth* because, as the Court emphasized, "[t]he University's whole justification for fostering the challenged expression is that it springs from the initiatives of students," *id.* That is also true here. Santa Fe has opened a venue for student-led, student-initiated expression. The individual student speaker acts as a circuit breaker who alone determines the content and viewpoint of the speech. As *Southworth* underscores, the resulting speech is self-evidently student speech.

Southworth also makes clear that Santa Fe has disclaimed responsibility for any student speech in a manner that reinforces the Football Policy's constitutionality. In emphasizing that *Southworth* involved student speech, the Court observed that "[t]he University ha[s] disclaimed that the speech is its own," *id.* Of course, the University did not send a representative to every student club meeting to utter an affirmative oral disclaimer that any speech that occurred was solely that of the students, and not government speech. Instead, the Court found a disclaimer based on the University's administration of the policy as a whole. The Santa Fe Football Policy includes just such a disclaimer on the face of the policy. The Football Policy emphasizes that the "student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver." As in *Southworth*, Santa Fe has "disclaimed the speech as its own."

II. The Student Election of a Speaker Bears No Resemblance to the Majoritarian Defunding Referendum Questioned in *Southworth*.

Southworth concluded that a peculiar provision of the compelled funding mechanism, which permitted a majority of students to defund an unpopular club through a referendum, required further analysis on remand to determine whether it was viewpoint neutral. *See* slip op. at 16-17. Respondents take this language out of its free speech/compelled funding context and suggest that the Football Policy is doomed because it involves student votes. In respondents' view, *Southworth* signals the end of the Nation's long (and apparently nefarious) experiment with student elections, as long as a right to speak hangs in the balance. This is not an exaggeration of respondents' position. It is their position. "[*Southworth*] does mean that wholly private speakers cannot be elected for the sole purpose of speaking," Resp. Supp. Br. at 7; *see also id.* ("Private speakers given preferential access must be selected on viewpoint-neutral criteria, and winning an election is not such a criterion").

Respondents view of *Southworth* is flatly wrong. *Southworth* did not hold that all student elections[2] violate the right to free speech. (Even if this were true, it would scarcely help respondents, who bring no free speech claim.)

Respondents confuse the selection of the one to fill a position with the allocation of access or other resources. The foundation of democratic process is selection, by election, of representatives. Voters select those who will speak for them in the federal, state, and local government. Students likewise

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[2]Respondents claim to distinguish the "election of public officials or student leaders to perform many diverse tasks over a period of time, only some of which involve speech," Resp. Supp. Br. at 2; *see also id.* at 9. This supposed distinction does not assist respondents. First, the primary task of elected representatives *is* to speak, whether by vote as legislators or by advocacy of policies and proposed legislation. Second, if elections are viewpoint-based, it is *worse*, not better, if the winner of the fatally viewpoint-based election has the power to act as well as speak.

select those who will speak for them in student government. Selection by election is also used to confer honors and privileges. The Speaker of the House and the recipients of Congressional Medals of Honor, for example, are the beneficiaries of votes from an electoral body. Student analogues might include the selection of a talent show winner, a Hall of Fame inductee, a "Favorite Teacher" award recipient, or a Homecoming Queen. It is absurd to read *Southworth* as judging these elections to be unconstitutionally viewpoint-based. Thus, whether the student speaker under the Football Policy is viewed as an elected representative or as the recipient of an honor or privilege, *Southworth* casts no shadow of unconstitutionality.

In *Southworth*, by contrast, a variety of student groups enjoyed equal rights to use facilities and seek funding, except that a majority vote could cancel -- or guarantee -- the funding of any particular disfavored -- or favored -- group. This arbitrary imposition of inequality among equals is what troubled the *Southworth* Court. Suppose, for example, that a school, while otherwise observing the Equal Access Act, conditioned a student club's existence upon approval by a majority vote of students at large. This subjecting of clubs to a "heckler's license" would violate the free speech (and association) rights of the would-be club members under *Southworth*. But a student vote for "Club of the Year" distinction in the student yearbook would impose no unequal burden, and would create no free speech difficulty.

Student elections are common features of student life. They are the normal mechanism for electing a student for an honor or responsibility. Indeed, involvement in such voting processes helps prepare students for the duties of citizenship in a republican democracy. Deviation from the normal student election process would necessitate some explanation. It is hard to imagine how the explanation could be delivered without sending messages of distrust of students and hostility toward religion. The defunding referendum in *Southworth*, by contrast,

is hardly a common or normal feature of student life. Rather than selecting a student for a duty, office, or honor, the referendum singles out one club for a loss of funding that all clubs would otherwise share more or less equally based on neutral criteria.

In short, nothing in *Southworth* suggests that students could not participate in more traditional elections.

Respondents' distorted view of *Southworth* implies that a runner-up in a student election could sue, claiming that the selection process was viewpoint-based. But the fact of the matter is that such a student litigant would lose, and rightly so. *Southworth* does not invigorate such a frivolous free speech claim,[3] much less an Establishment Clause claim.

Finally, respondents ignore that they have not elected to bring a free speech challenge to the Santa Fe Policy. An intervening decision of this Court allows a party to file a supplemental brief, not to amend its complaint.

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[3]The student respondents here do not in any event claim that they were wrongfully denied (or even sought) the position of pregame student speaker.

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In The

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF SENATOR JAMES M. INHOFE (R OKLAHOMA); CONGRESSMEN MARK E. SOUDER (R IN 4), JOSEPH R. PITTS (R PA 16), RICHARD K. ARMEY (R TX 26), TOM DELAY (R TX 22), ROBERT B. ADERHOLT (R AL 4), BOB BARR (R GA 7), ROSCOE G. BARTLETT (R MD 6), JOE L. BARTON (R TX 6), HELEN CHENOWETH-HAGE (R ID 1), JAMES DEMINT (R SC 4), JAY W. DICKEY (R AK 4), VIRGIL H. GOODE, JR. (D VA 5), RALPH M. HALL (D TX 4), JOHN N. HOSTETTLER (R IN 8), SAM JOHNSON (R TX 3), SUE MYRICK (R NC 9), RON PAUL (R TX 14), TOM TANCREDO (R CO 6), ZACH WAMP (R TN 3), DAVE WELDON (R FL 15); AND WALLBUILDERS, INC.
in support of the *Petitioner*

Barry C. Hodge
Counsel of Record for Amici Curiae
The National Legal Foundation
11521-E Midlothian Turnpike
Richmond, VA 23235
(804) 897-2340

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INTEREST OF AMICI CURIAE[1]

Amici curiae Senator James M. Inhofe (R Oklahoma) and Congressmen Mark E. Souder (R IN 4), Joseph R. Pitts (R PA 16), Richard K. Armey (R TX 26), Tom DeLay (R TX 22), Robert B. Aderholt (R AL 4), Bob Barr (R GA 7), Roscoe G. Bartlett (R MD 6), Joe L. Barton (R TX 6), Helen Chenoweth-Hage (R ID 1), James DeMint (R SC 4), Jay W. Dickey (R AK 4), Virgil H. Goode, Jr. (D VA 5), Ralph M. Hall (D TX 4), John N. Hostettler (R IN 8), Sam Johnson (R TX 3), Sue Myrick (R NC 9), Ron Paul (R TX 14), Tom Tancredo (R CO 6), Zach Wamp (R TN 3), and Dave Weldon (R FL 15) are members of the United States Senate and of the United States House of Representatives. Senator Inhofe represents the state of Oklahoma with a population of approximately 3.3 million. Each member of the House represents approximately 600,000 to 650,000 constituents. In total these amici represent approximately 15.8 million Americans. Each of these amici is acutely aware that the decision of this Court in this case will impact his or her constituents and believes that it is not in the best interest of those constituents to deny them the right to engage in prayers at various public events. Although this case involves a facial challenge to one school district's policy that might or might not even result in prayers at football games, amici are aware that the possible ramifications of the decision are much broader than the limited facts of the present controversy.

Amicus curiae WallBuilders, Inc. is a 501c (3) organization that is dedicated to the restoration of the moral and religious foundation on which America was built. As

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[1] Counsel of record to the parties in this case have consented to the filing of this brief through blanket consent letters which have been filed with the Clerk. Additionally, Counsel for Jane Doe, et al. has consented by individual letter to Counsel of Record for amici. No counsel for any party has authored this brief in whole or in part. No person or entity, other than the amicus curiae WallBuilders, Inc., has made any monetary contribution to the preparation or submission of this brief.

such, the organization has a direct interest in seeing that students be allowed to pray if they so desire.

SUMMARY OF ARGUMENT

Justice O'Connor has warned that Establishment Clause jurisprudence, including the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), must be applied in a manner that takes into account the various different categories of Establishment Clause cases. Justice Kennedy issued a similar warning in *Lee v. Weisman*, 505 U.S. 577 (1992), that applies to *Lee* itself. When these warnings are heeded, these tests will not be applied woodenly. When the underlying principles are understood, Santa Fe's Football Prayer Policy is clearly constitutional. The Eleventh Circuit's recent case of *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), provides a good model for how to apply Establishment Clause principles to the case at bar.

By way of contrast, the test employed by the Fifth Circuit panel in this case should be rejected. The panel opinion in this case introduced a new test into the already confused Establishment Clause Jurisprudence, namely the "solemnization test." Under this test, the court said that football games were not the type of events that are capable of being solemnized. Therefore, students cannot pray at football games. This test is bad for two reasons. First, the school proffered other secular purposes, but these reasons were ignored. But second and more importantly, any type of public prayers at public events can now be challenged as inappropriate under the theory that the event in question cannot be solemnized.

In addition to these problems, the test seems to be driven by an impermissible hostility towards religion.

If the Supreme Court adopts this test, the implications are obvious and disconcerting. This country will face years of litigation in which prayers at various public events will be

challenged. In all of these cases, judges will have no legal principle to guide them—it will all be the judge's opinion.

ARGUMENT

I. INTRODUCTION—THE SEARCH FOR PROPER PRINCIPLES

This case is of great interest and significance to the American people. Prayer at public events is a long standing tradition in this country—a tradition that should be allowed to continue unless and until someone can demonstrate that it violates the Constitution. In this case as in many others, a federal court has declared that such prayers—this time at football games—are, in fact, unconstitutional. Yet as this case comes before this Court, it is hard to tell *why* the Fifth Circuit held the Policy regarding student-led, student-initiated speech at football games to be unconstitutional. The policy simply allows for students to decide whether they will have a speaker prior to sporting events. If students so chose, the policy allows the selected student to decide whether his or her private speech will include a "brief invocation and/or message." *Doe v. Santa Fe Ind. Sch. Dist.*, 168 F.3d 806, 812 (5th Cir. 1999).

In part it is hard to tell why the Fifth Circuit held the Football Pre-game Policy unconstitutional because the court dedicated most of its opinion to the issue of the School District's policy on graduation prayer and gave short shrift—indeed just one paragraph—to its analysis of the Football Policy. But that is not the only reason it is difficult to discover the court's rationale. The Fifth Circuit's rationale is also hard to understand because it did little more than quote the holding of one of its prior cases, *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).

However, there are two interrelated problems with the *Santa Fe* court's use of *Duncanville*. First, the court significantly altered the quotation upon which it relied. The

Santa Fe court quoted the *Duncanville* court as saying, "Here, we are dealing with a setting [football and basketball games] far less solemn and extraordinary . . . ." *Santa Fe*, 168 F.3d at 822-23 (*quoting Duncanville*) (alteration original to *Santa Fe*). But this is simply not a justifiable alteration of the quotation. The *Duncanville* court was dealing with school employee-supervised prayers at basketball team practices, in the basketball team locker room, after basketball games at center court, and on the basketball team bus. The *Duncanville* court specifically stated: "DISD [Duncanville Independent School District] makes no attempt to distinguish the prayers given before football games and at awards ceremonies from those given at basketball games. *To the extend that these situations are materially alike*, our opinion applies equally." *Duncanville*, at 405, n.2 (emphasis added).

Whether or not there are material differences between the various basketball prayers at issue in *Duncanville* and that district's football prayers, there are clearly material differences between Duncanville's basketball prayers and Santa Fe's Football Game Message Policy at issue here. As just one example, the Message Policy at issue here does not authorize prayers conducted under the direct supervision of a school employee who routinely and repeatedly has control of a small number of the same students, as were the prayers in *Duncanville*. *Duncanville* at 404. Thus, the *Duncanville* analysis does not, at least on its face, apply to the *Santa Fe* case at all. Yet that is as close to an articulated rationale as the court gave.[2]

This points to the second interrelated problem. The *Santa Fe* court was not careful to apply the proper

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[2] It is true that the court stated in a footnote early in its opinion that "Although for the sake of simplicity and clarity we address SFISD's arguments only as they relate to graduation ceremonies, our analysis applies with equal, if not greater, force to the Football Policy as well." Santa Fe at 814, n.7. However, one of the graduation prayer policies was *upheld*. The only grounds for declaring the Football Pre-game Policy *un*constitutional was the solemnization issue.

Establishment clause principles in a highly sensitive, fact-specific, "case-category-specific"[3] manner. Instead it merely took some Establishment Clause verbiage—entirely out of context—and applied it without even trying to distill the underlying principles and separating those that applied to the facts before it from those that did not.

The *Santa Fe Court* is not alone in this shortcoming. Indeed, many federal courts have failed to abide by the admonitions of several members of this Court that Establishment Clause cases must be analyzed using only those principles that are appropriate to various sub-categories of cases.

Had the court analyzed the Football Pre-game Policy with this admonition in mind, it would have found the prayers constitutional, whether it had used the *Lemon* test or the *Lee* test. Whether one employs *Lemon* or *Lee* or both, one must beware the problem described by Justice O'Connor in the following lengthy but important passage:

> It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause. . . .
>
> But the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content-neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on. This simply reflects the necessary recognition that the interests relevant to the Free Speech Clause inquiry-personal liberty, an informed citizenry,

[3] See *infra* for discussion of this term.

> government efficiency, public order, and so on-are present in different degrees in each context.
>
> And setting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless. I suppose one can say that the general test for all free speech cases is "a regulation is valid if the interests asserted by the government are stronger than the interests of the speaker and the listeners," but this would hardly be a serviceable formulation. Similarly, *Lemon* has, with some justification, been criticized on this score.
>
> Moreover, shoehorning new problems into a test that does not reflect the special concerns raised by those problems tends to deform the language of the test. Relatively simple phrases like "primary effect . . . that neither advances nor inhibits religion" and "entanglement," acquire more and more complicated definitions which stray ever further from their literal meaning.

Bd. of Ed. of Kiryas Joel. v. Grumet, 512 U.S. 687, 718-19 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

After drawing these parallels between this Court's Free Speech and Establishment Clause jurisdiction, Justice O'Connor went on to explain the dangers present in trying to woodenly apply the *Lemon* test to the wide diversity of Establishment Clause cases the courts have had to deal with:

> I think it is more useful to recognize the relevant concerns in each case on their own terms, rather than trying to squeeze them into language that does not really apply to them.

Finally, another danger to keep in mind is that the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with *Lemon*.

Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches. Some cases, like this one, involve government actions targeted at particular individuals or groups, imposing special duties or giving special benefits. Cases involving government speech on religious topics, see, e.g., *Lee v. Weisman*, supra; *Allegheny County v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Stone v. Graham*, 449 U.S. 39 (1980), seem to me to fall into a different category, and to require an analysis focusing on whether the speech endorses or disapproves of religion, rather than on whether the government action is neutral with regard to religion. *See Allegheny County*, *supra*, at 623-637 (O'Connor, J., concurring in part and concurring in judgment).

Another category encompasses cases in which the government must make decisions about matters of religious doctrine and religious law. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). . . . Government delegations of power to religious bodies may make up yet another category. As

> *Larkin* itself suggested, government impartiality towards religion may not be enough in such situations: A law that bars all alcohol sales within some distance of a church, school, or hospital may be valid, but an equally evenhanded law that gives each institution discretionary power over the sales may not be. *Larkin*, supra, at 123-124. *Of course, there may well be additional categories, or more opportune places to draw the lines between the categories.*

Id. at 719-21 (emphasis added).

Having already pointed out some of the problems with an overly-unitary approach, Justice O'Connor then discussed some of the advantages of the case-category-specific approach:

> As the Court's opinion today shows, the slide away from *Lemon's* unitary approach is well under way. A return to *Lemon*, even if possible, would likely be futile, regardless of where one stands on the substantive Establishment Clause questions. I think a less unitary approach provides a better structure for analysis. If each test covers a narrower and more homogeneous area, the tests may be more precise and therefore easier to apply. There may be more opportunity to pay attention to the specific nuances of each area. There might also be, I hope, more consensus on each of the narrow tests than there has been on a broad test. And abandoning the *Lemon* framework need not mean abandoning some of the insights that the test reflected, nor the insights of the cases that applied it.

> . . . [I]t seems to me that the case law will better be able to evolve towards this if it is freed from the *Lemon* test's rigid influence. The hard questions would, of course, still have to be asked; but they will be asked within a more carefully tailored and less distorted framework.

Id. at 721.

This quotation is not invoked here to advocate that this Court ignore or reject *Lemon* (although that could be considered a major thrust of Justice O'Connor's comments). As has been pointed out repeatedly, *Lemon* has never been overturned. Rather, the point is to note that whether one uses *Lemon* or *Lee*, the analysis must be case-category specific.[4]

In fact, Justice O'Connor's process could be, indeed should be, followed even further. For example, she discussed *Lee* with *Allegheney County* and *Stone*. Yet there are important differences between graduation prayer cases and religious display cases. One such difference is that the religious display category of Establishment Clause cases have different standing rules than other Establishment Clause cases in at least some Circuits. *See, e.g., City of Edmond v. Robinson*, 134 L. Ed. 2d 801 (*cert. denial*) (Rehnquist, C.J., Scalia, Thomas, JJ., *dissenting*).

Thus, the lesson of Justice O'Connor's quotation is that under both *Lemon* and *Lee*, one must use a very case-category specific approach. A principles-not-prongs approach will produce the best results. When courts do not heed this warning, jurisprudential chaos is the result.

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[4] Nor is it the purpose of this brief to suggest other replacement tests. Amici believe that it *would* be possible to have a more unified approach to Establishment Clause jurisprudence were that jurisprudence truer to the intent of the Framers. The entire discussion in this brief is based on "what is," not on what "might be" or "what ought to be."

II. THE PROPER APPROACH UNDER *LEMON*

The decision of the *Santa Fe* court has seriously exacerbated the confused Establishment Clause jurisprudence in the Fifth Circuit. In fact, six judges joined a dissenting opinion filed by a seventh judge in the Denial of Rehearing *En Banc* in the present case. *Doe v. Santa Fe Ind. Sch. Dist.*, 171 F.3d 1013, 1014 (5th Cir. 1999). Judge Jolly, who wrote the dissent, and his colleagues aimed some unusually harsh words at the panel decision. For example, the dissent states:

> The *Santa Fe* majority also casts our Circuit's Establishment Clause jurisprudence into throes of uncertainty. The majority opinions in *Santa Fe* and *Jones v. Clear Creek Independent Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), are so clearly in conflict with each other that school districts within our jurisdiction will have no guidance on how to interpret our confused precedent.

Id. at 1015. Although most of what was written in the opinion was aimed at that part of the panel decision that discussed graduation prayers, it is true that *Santa Fe* has created a "jurisprudential quagmire" in the Fifth Circuit. *Id.* We have reached a sad state of affairs when seven judges characterize their own jurisprudence in this manner.

And the Fifth Circuit is by no means alone. Perhaps an even more egregious example of ignoring the use of sub-category specific analysis is provided by the recent panel decision in *Adler v. Duval Co. Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999) (*Adler II*). *Adler II* involved graduation prayers. In its *Lemon* analysis, the *Adler II* court looked at cases dealing with creation science, *Edwards v. Aguillard,* 482 U.S. 578 (1987); moments of silence, *Wallace v. Jaffree*, 472 U.S. 38 (1985); nativity scenes, *Lynch v. Donnelly,* 465 U.S. 668 (1984), charitable solicitation laws, *Church of Scientology*

Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514 (11th Cir.1993), and prayer at football games, *Jager v. Douglas County Sch. Dist.,* 862 F.2d 824, (11th Cir. 1989), in addition to cases dealing with graduation prayer. Presumably, *some* of the propositions for which these cases were cited could validly be applied across categories. Nonetheless, the overall result was exactly what Justice O'Connor predicted it would be—confusion.

Unfortunately, an already bad result was compounded because the graduation prayer cases that the *Adler II* majority cited, *Doe v. Santa Fe Indep. Sch. Dist.,* 168 F.3d 806 (5th Cir.1999) (the case now, in part, before this Court); *Doe v. Madison Sch. Dist. No. 321,* 147 F.3d 832 (9th Cir.1998); *ACLU of New Jersey v. Black Horse Pike Regional Bd. of Ed.,* 84 F.3d 1471 (3d Cir.1996) (*en banc*); *Harris v. Joint Sch. Dist. No. 241,* 41 F.3d 447, (9th Cir. 1994), went even further afield and incorporated this cross-categorical analysis multiple times over. The cases utilized by the *Santa Fe, Madison, Black Horse, and Harris* courts in their *Lemon* analyses included the following Establishment Clause categories: tax funding, services, religious displays (in and out of schools), baccalaureate services, equal access, Bible reading, release time, publishing, moments of silence, legislative chaplains, employment, and school districting cases, in addition to school prayer cases in numerous settings, including the classroom, assemblies, after school, and at sports events. See *Santa Fe, Madison, Black Horse, and Harris, passim.*

Because of this state of affairs and because of our concern over the disastrous results it is producing around the country, *amici* urge this Court to give guidance to the federal courts in how to apply Establishment Clause principles. Even without this Court overruling *Lemon*, the federal courts should be capable of ascertaining and applying *appropriate* Establishment Clause principles to various categories of prayer cases.

As an example of a court that got it right, *amici* suggest the approach of the Eleventh Circuit Court of Appeals in *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999). In Chandler, the Eleventh Circuit had before it an injunction issued by a trial court that prohibited, among other things, a school district from permitting certain religious activities by students at events such as football games, graduation ceremonies, and other school events. The Alabama Attorney General's Office challenged the injunction specifically as it related to the aspects just mentioned, i.e, prohibiting student religious speech at various events including football games. *Id.* at 1257-58. The Eleventh Circuit vacated the entire injunction holding that the prohibition against permitting student religious speech violate the First Amendment. *Id.* at 1266. Given that religious speech at sporting events was involved, the analysis of the *Chandler* court is very instructive in the instant case.

The *Chandler* court never engaged in a standard prong-by-prong *Lemon* analysis. In fact, other than in a parenthetical in footnote 12, the *Chandler* court never even mentioned *Lemon*. Indeed, the lion's share of its analysis was done under the headings of Free Exercise and Free Speech. Yet one finds throughout the Establishment, Free Exercise, and Free Speech portions of the opinion—in a nuanced and case-category appropriate manner—*Lemon's* Establishment Clause *principles*. For example, in analyzing other cases, the *Chandler* court spoke of "the State's decision to create an exclusively religious medium . . . not the 'permitting' of religious speech . . ." *Chandler,* 180 F.3d at 1259. This is the language of purpose. The opinion addresses whether certain practices advance or endorse religion; it speaks of hostility and neutrality. *Id.* at 1259-1265. The opinion discusses teacher participation that creates entanglement. *Id.* at 1264.

Thus, *Chandler* utilized *Lemon's* principles without ever invoking the test itself. Yet *where appropriate*, the *Lemon* principles were utilized. And the result was much more desirable, in that that court also heeded Justice

O'Connor's admonition to pay attention to case categories. The *Chandler* court did not woodenly examine what various other courts had said under each of *Lemon's* prongs, regardless of context, and thereby introduce extraneous statements applicable to totally different categories of cases. Other than one sentence that quickly summarized several lower court graduation cases, *Id.* at 1259, the *Chandler* court stuck almost exclusively[5] to Supreme Court cases involving prayer and other religious speech in academic contexts. *Id.* at 1257-1265.

The conclusion of the *Chandler* court under its category-specific-principles-not-prongs approach to *Lemon* is clear: Schools cannot refuse to permit students to speak religiously at school-organized or -sanctioned events. *Id.* at 1265. *Chandler's* message is also clear that courts may not order schools to refuse to permit such speech. *Id.* Quite to the contrary, schools have a constitutional *duty* to affirmatively permit this speech. *Id.* at 1263. Thus, under the principles of *Lemon*, as appropriately applied in *Chandler*, the Football Policy in this case is constitutional.

It is of interest to note that *Adler II* and *Chandler* both came out of the Eleventh Circuit. This highlights the confusion that exists in the federal courts. If we continue to use *Adler II* and *Chandler* as examples of a court that got it right and a court that got it wrong, we gain several more useful insights.

Suppose one takes the approach of the *Adler II* majority. The majority did not examine the prayer guidelines before it under *Lemon's* excessive entanglement prong. However, it found that both the policy's purpose and its effect were to "permit prayer." *Adler II,* 174 F.3d at 1249-51. Of course, some will disagree with these assertions. They will find the arguments contained in the dissent more persuasive. *See id.* at 1265-71. But let us assume *arguendo* that the *Adler*

[5] Most notably, there are several references to *Lynch*. There are other minor exceptions as well.

II majority was correct. If the purpose and effect of the guidelines were to permit prayer, the guidelines are, as we have just seen, constitutional, not unconstitutional under *Chandler*.

Amici suggest that the *Chandler* court has struck exactly the right balance under those Establishment Clause principles which apply to prayers at school-related public events:

> How, then, does a school accommodate religious expression without commanding it? . . . the answer is simply it is to be "permitted." Not required. Not commanded. Not even suggested. Simply permitted. If students, or other private parties, wish to speak religiously while in school or at school-related events, they may exercise their First Amendment right to do so.

Chandler, 180 F.3d at 1264 (describing the position of the Defendant school board, which position the court held to be correct).

The *Chandler* court spoke other strong words on this point, stating "It would be easy simply to banish prayer from our public institutions, but this would be not only constitutionally incorrect, but also fundamentally unfair to our society." *Id.* Furthermore, the *Chandler* court called permitting students to pray a "constitutional requirement." *Id.* What the *Adler II* court found to be a constitutional infirmity, the *Chandler* court correctly characterized as a constitutional requirement. Therefore, if the *Adler II* court was right about the guidelines' purpose and effect, the guidelines are *quintessentially* constitutional. They enable the school district to fulfill its constitutional duty and they protect the rights of all. Similarly here, the Football Pre-Game Policy is quintessentially constitutional because it allows Santa Fe ISD to fulfill its constitutional duty and it protects the rights of all.

Only one thing remains to be said about the more wooden *Lemon* approach of the *Adler II* court (since we are for the moment exploring how the guidelines at issue there and the Football Pre-game Policy at issue here should fare under this approach). It may seem strange to say that "permitting prayer" serves a "secular" purpose. After all, prayer is not secular. However, there are several ready answers. The first answer is that this policy neither advances nor inhibits religion. It ensures neutrality toward religion. That is a secular purpose. (Although the neither-advances-nor-inhibits paradigm is usually associated with the effect prong, this same paradigm has been applied to the purpose prong and seems to shed light here. *See, e.g., Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963); and *Agostini v. Felton*, 521 U.S. 203, ___, 117 S. Ct. 1997, 2010 (1998).) The second answer is provided by the forum analysis approach discussed by Judge Jolly in his *Santa Fe* panel dissent: providing a neutral forum for speech serves a secular purpose. *Santa Fe,* 168 F.3d at 824-36 (Jolly, J., dissenting).

III. THE PROPER APPROACH UNDER *LEE V. WEISMAN*

The *Santa Fe* court also missed the mark on *Lee v. Weisman*. It held that the Football Pre-game Policy was unconstitutional despite being offered under a "pure Clear Creek Prayer Policy." *Santa Fe,* 168 F.3d at 822. In other words, the policy involved nonsectarian, nonproselytizing prayer such as had been upheld (at graduations) in the *Clear Creek II* case under various analyses, including a *Lee* analysis. Thus, the *Santa Fe* court believed that the Football Pre-game Policy was unconstitutional under *Lee*. But a proper understanding of the *principles* of *Lee* leads to the conclusion that the Football Pre-Game Policy is constitutional.

In *Lee*, Justice Kennedy expressed the same concern that Justice O'Connor expressed in *Kiryas Joel* (see above)

that Establishment Clause principles be utilized in case-category-fact-specific manner:

> These *dominant facts* mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are, in a fair and real sense, obligatory, though the school district does not require attendance as a condition for receipt of the diploma.
>
> This case does not require us to revisit the difficult questions dividing us in recent cases, *questions of the definition and full scope of the principles governing the extent of permitted accommodation* by the State for the religious beliefs and practices of many of its citizens. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573 (1989*); Wallace v. Jaffree,* 472 U.S. 38 (1985*); Lynch v. Donnelly*, 465 U.S. 668, (1984). For without reference to those *principles in other contexts*, the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. . . . The government involvement with religious activity *in this case* is pervasive, to the point of creating a state-sponsored and state-directed religious

> exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine *the question before us*.

Lee at 596-97 (emphasis added).

Thus, at bottom, the *principles* of *Lee* could be considered the same as the *principles* of *Lemon*. However, there is more that can profitably be gained by looking at the instant case through the lens of *Lee*. First, we should take Justice Kennedy's admonition seriously not to ignore the each case's context. Applying this principle to *Lee* itself means that if the dominant facts are not present, various prayers or prayer policies could very well be constitutional. In other words, *Lee* is deliberately self-limiting. This is evident from Justice Kennedy's own words. Justice Kennedy wrote: "We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." *Id*. at 598-99.

These words take on new meaning when one stops to think of examples. Here we are not dealing with graduation time. Therefore, we need only imagine examples of religious values, practices and persons interacting public schools and their students at other times throughout the educational process.

An example of religious values, practices and persons interacting with public schools *students* would be students encountering a sidewalk evangelist on a public sidewalk near their school. The evangelist's target audience is specifically school students, but the activities do not implicate the *school*.

But the Football Policy at issue here is an example of religious values, practices and persons interacting with *public schools* throughout the educational process. Here, the *schools* sponsor an event that involves students, parents, other

relatives, and the general public. It is in a very real sense an event of the entire community. If, in fact, the students decide to have a speaker, and if in fact, the speaker decides on his or her own initiative to include a religious sentiment, that is protected speech.

Furthermore, football games, as the *Santa Fe* court points out, are not the unique, once-in-a-lifetime event that graduation is. *Santa Fe,* 168 F.3d at 822-23. In *Lee*, Justice Kennedy described the multiplicity of unique characteristics of graduation ceremonies. *Lee*, 505 U.S. at 595. It was *because of* these characteristics and the high cost of forfeiting this unique experience that Justice Kennedy wrote that the graduation ceremony was "in a fair and real sense obligatory." Id. at 586. Whatever place high school football games may have in Santa Fe or any other community, they do not partake of the characteristics that Justice Kennedy so eloquently described. Without the same obligatory nature of the event, the principles of *Lee* indicate the constitutionality, not the unconstitutionality of the football prayers.

Another *Lee* principle also shows that the Football Policy is constitutional. The *Lee* Court explained that psychological coercion would likely occur in "a state-sanctioned religious exercise." *Id*. at 597. According to the Court, the entire graduation ceremony was not the state-sanctioned religious exercise; rather the prayer itself was the state-sanctioned religious exercise. *Id*. at 594. If there is no state-sanctioned religious exercise there is no need to be concerned about the state psychologically coercing anyone. And the *Lee* Court clearly stated that it was *clergy-led state-mandated* prayer that constituted a state-sanctioned religious exercise. *Id*. at 597. In the instant case there is no state-mandated prayer and no clergy-led prayer. Therefore, there is no state-sanctioned religious exercise and no concern over psychological coercion.

Thus, one sees that, whether analyzed under the principles of *Lemon* or the principles of *Lee*, Santa Fe ISD's Football Pre-game Policy is clearly constitutional. *Amici* urge this Court to reject the largely unarticulated and muddled approach of the *Santa Fe* court. Instead, this Court should apply a principles-not-prongs approach to the case before it. *Amici* commend the *Chandler* analysis to this Court as a paradigm of the proper approach. By adopting the *Chandler* approach, this Court will not only declare the constitutionality of the Policy at issue in this case, it will also clarify for the federal courts the proper approach to the myriad of Establishment Clause cases they encounter.

IV. THE FIFTH CIRCUIT'S NEW ESTABLISHMENT CLAUSE TEST

In contrast to the approach of the *Chandler* court, the Fifth Circuit Court of Appeals, in the present case, has adopted a dangerous new "legal test" that is not really legal at all. The Fifth Circuit has decided that public prayers will now be subjected to a "solemnization test." In holding prayers at football games unconstitutional, the court wrote "[t]he prayers are to be delivered *at football games*—hardly the sober type of annual event that can be appropriately solemnized with prayer." *Doe v. Santa Fe Indep. Sch. Dist.* 168 F.3d 806, 823 (emphasis in the original).

The ramifications of such a test are startling to say the least. This country will face years of litigation in which prayers at various public events will be challenged. Event after event will have to be categorized as either solemnizable or non-solemnizable. As more and more events are categorized, litigants will try to persuade judges that the event over which they are fighting is similar to or different from one or another event upon which some other judge has already ruled. Thus, they will argue, the new event should either be characterized as solemnizable or non-solemnizable, depending on what side of the issue they are on. And in all of

this, judges will have no legal principles to guide them—it will all be the judge's opinion (no doubt camouflaged as much as possible in legalese and precedent to try to give the appearance that principles are being invoked). This is not what American's religious liberties should depend upon.

V. THE FIFTH CIRCUIT'S ANALYSIS CREATES HOSTILITY, NOT NEUTRALITY, TOWARD RELIGION

The Fifth Circuit opinion in *Santa Fe* appears to be driven by distaste for its own decision in *Jones v. Clear Creek*, 977 F.2d 963 (5th Cir. 1992) (*Clear Creek II*), and for this Court's decision in *Bd. Of Educ. Of Westside Community Sch. v. Mergens*, 496 U.S. 248 (1990), as well. For example, the court wrote:

> There is, moreover, a crucial distinction between the speech involved in *Mergens* and the speech that SFISD's policy would allow. In *Mergens*, the Court held that permitting the Christian student organization to meet on school grounds after class and to recruit members through the school newspaper, bulletin boards, and public address system, did not violate the Establishment Clause. Thus, the organization was not permitted to deliver a religious message directly to the student body. The religious organization did not use any of the various methods of communication controlled by the school to proselytize—or to deliver religious messages of any nature—but rather confined such activities to meetings held after class with virtually no trace of governmental imprimatur. *Clear Creek II* took *Mergens* one baby step closer to the brink, allowing delivery of prayer to the student body but only if such prayer were

> nonsectarian and nonproselytizing. SFISD's July Policy, however, would plunge over the cliff, by permitting students to present overtly sectarian and proselytizing religious prayers to a group of students clearly assembled at the behest of the government.

Santa Fe, 168 F.3d at 821, n.11.

The language of taking "*Mergens* one baby step closer to the brink" implies (if not more than implies) that *Mergens* itself was headed in a dangerous direction. Yet for this court to have decided *Mergens* in the opposite manner would have been to treat religious students differently than all other students.

The *Santa Fe* court also went out of its way in several passages to point out that it had no choice but to follow *Clear Creek II*. For example, the court noted:

> In beginning our analysis, it is well to note that our role is necessarily limited to elucidating our prior precedent in the light of its context and such subsequent clarifications as the Supreme Court has announced. *See Hogue v. Johnson*, 131 F.3d 466, 491 (5th Cir. 1997) ("One panel of this Court may not overrule another [absent an intervening decision to the contrary by the Supreme Court or the en banc court . . .]."), *cert. denied*, __ U.S. __, 118 S. Ct. 1297 (1998).

Santa Fe, 168 F.3d at 814.

Indeed, some passages from the court's opinion do not merely objectively state that it is bound by *Clear Creek II*, but rather appear to engage in sarcasm or drip frustration. Several examples illustrate this:

> More to the point, we now conclude, in obeisance to the ineluctable precedent of *Clear Creek II*, that a knock-off of a Clear Creek Prayer Policy that does not limit speakers to nonsectarian, nonproselytizing invocations and benedictions violates the dictates of the Establishment Clause.

Santa Fe, 168 F.3d at 813.

And again, we read:

> Only the combination of the factors relied on in *Clear Creek II*—that the prayer was student-led *and* nonsectarian, nonproselytizing—saved that school district's graduation prayers from being anathematized a "formal religious exercise" for the purposes of *Lee's* Coercion Test. *Cf. Lee*, 505 U.S. at 588-90 (holding nonsectarian, nonproselytizing graduation prayer delivered by rabbi was "formal religious exercise"). Again, because sectarian and proselytizing prayers are by their very nature designed to promote a particular religious viewpoint rather than solemnize an otherwise purely secular event, they cannot find sanctuary in the tightly circumscribed safe harbor of *Clear Creek II* and thereby avoid the appellation "formal religious exercise."

Santa Fe, 168 F.3d at 818 (emphasis original).

Two final examples further demonstrate the attitude of the *Santa Fe* court:

> In sum, our *Clear Creek II* opinion explicitly — and (we are bound by *stare decisis* to acknowledge) correctly — relies on Clear Creek ISD's nonsectarian, nonproselytizing

> restrictions to dodge the outcome otherwise dictated by *Lee*.

Santa Fe, 168 F.3d at 822.

> Whether or not we agree with *Clear Creek II's* conclusion that the student-led graduation prayers do not transgress the Establishment Clause even though they do not constitute private speech, we are bound by its judgment unless and until this Court reconsiders the matter *en banc* or the Supreme Court holds otherwise.

Santa Fe, 168 F.3d at 821, n.12.

Distaste for *Clear Creek II* and especially for *Mergens* smacks of the hostility towards religion that this Court and various individual Justices have repeatedly said is not appropriate in this country. In *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952), this Court noted:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in

> the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

Similarly, in his dissenting opinion in *Allegheny Co. v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), Justice Kennedy surveyed many of this Court's statements on hostility. In the process, he noted that:

> Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. *Lynch v. Donnelly*, *supra*, at 678; *Walz v. Tax Comm'n of New York City*, *supra*, at 669. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious. A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval. In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain

> the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

Allegheny Co., 492 U.S. at 657-58.

One opinion of this Court from which Justice Kennedy quoted in *Allegheny Co* is particularly worth repeating here:

> It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.
>
> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion . . . .

Abington Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

Hostility toward religion is no more permissible in the federal judiciary than it is in any other branch of the federal government or in state and local governments. In fact, it is even less acceptable, for it is the judicial branch that must adjudicate Establishment Clause disputes. No citizen in this

nation can expect proper results to such disputes if the federal judiciary is hostile toward religion.

Therefore, this Court should not adopt the test of a court of appeals panel that is by all appearances hostile to religion, to its own precedents, and to the precedents of this Court. (As we shall see below, whether it is hostile to the precedent of this court or not, it has in any event misapplied them.)

VI. THE PROBLEMS WITH THE SOLEMNIZATION TEST

Whether or not this distaste and hostility can be read between the lines, there is little doubt that the results are the same as if it exists. *Santa Fe* and *Clear Creek II* are in direct conflict. As noted above, this was the view of Judge Jolly and the six judges that signed on to his dissent from the Denial of Rehearing *En Banc*. *Doe v. Santa Fe Ind. Sch. Dist.*, 171 F.3d 1013 (1999). Judge Jolly wrote, "The majority opinions in *Santa Fe* and *Jones v. Clear Creek Independent Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), are so clearly in conflict with each other that school districts within our jurisdiction will have no guidance on how to interpret our confused precedent." *Id.* at 1015.

This adds to the appearance that the *Santa Fe* panel was hostile to the *Clear Creek II* decision and was determined to limit it to as narrow a field as possible. But the only way to do this was to ignore the principles that animate *Clear Creek II* and emphasize solemnization. As noted previously, the *Santa Fe* court wrote, "[t]he prayers are to be delivered *at football games*—hardly the sober type of annual event that can be appropriately solemnized with prayer." Santa Fe, 168 F.3d at 823 (emphasis in the original).

The *Santa Fe* court went on to write:

> Regardless of whether the prayers are selected by vote or spontaneously initiated at these

> frequently-recurring, informal, school-sponsored events, school officials are present and have the authority to stop the prayers. Thus, as we indicated in *Duncanville*, our decision in *Clear Creek II* hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek Prayer Policy cannot survive. We therefore reverse the district court's holding that SFISD's alternative Clear Creek Prayer Policy can be extended to football games, irrespective of the presence of the nonsectarian, nonproselytizing restrictions.

Id.

It is true that the *Santa Fe* court's reliance upon solemnization is traceable to the Fifth Circuit's decision in *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995). But at least in *Duncanville*, solemnization was just one of several factors the court looked at. Nonetheless, the seed was planted. To the extent that the *Duncanville* and *Santa Fe* courts emphasized that graduation is a unique event, they stood this Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992) on its head.

In *Lee*, the fact that graduation is a unique event weighed against the constitutionality of the prayers, not in its favor. As noted previously, Justice Kennedy wrote:

> These *dominant facts* mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are, in a fair and real sense, obligatory, though the school district does not require

> attendance as a condition for receipt of the diploma.

Id. at 586. If the constitutionality of prayers at graduation can be upheld after *Lee*, as they were in *Clear Creek II*, then prayers at less unique events should be less problematic, not more problematic. And a Policy that merely allows for the possibility of such prayers should be even less problematic.

Somehow, the *Duncanville* and *Santa Fe* courts not only misunderstood this Court's discussion of the significance of graduation in *Lee*, it also misconstrued what the *Clear Creek II* court said about solemnization of graduation. What the *Clear Creek II* court said was this: We accept Clear Creek ISD's assertion that solemnization was a secular purpose for the prayer and also found solemnization to be the primary effect. *Clear Creek II*, 977 F.2d at 966-67. What the *Clear Creek II* court did not say was this: the *only acceptable* secular purpose or primary effect is solemnization.

This points to the first major problem with *Santa Fe*'s solemnization test. The court ignored the other purposes offered by the Santa Fe ISD. The court acknowledged that the school district proffered the following purposes for pre-game message: "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." *Santa Fe,* 168 F.3d at 812 (quoting Santa Fe ISD's Football Prayer Policy). Yet every purpose except solemnization is completely missing from the court's analysis.

This bodes ill for any and every other event which involves any public facility, official, or other involvement. This Court should roundly declare that solemnization is not the only acceptable secular purpose nor primary effect. As long as this Court continues to use the much criticized test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), it should at least make it clear that *Lemon* will not be narrowed even further. *Any* secular purpose must continue to satisfy *Lemon's*

first prong in prayer cases, not merely the single secular purpose of solemnization.

However, there is a second problem with *the Santa Fe* court's solemnization test. On what grounds can the court say that football games cannot be solemnized? The grounds can only be one thing—the court's *opinion*. There is no legal principle involved here.

Surely different people can hold different views about this issue. Yet the *Santa Fe* court has declared *that as a matter of constitutional law*, football games cannot be solemnized. The Framers of our Constitution would be surprised to find any such principle lurking in their handiwork.

As amici noted at the beginning of this brief, all sorts of prayers are now at risk in this country. What other events may some other court now declare to be "hardly the sober type of . . . event that can be appropriately solemnized with prayer"? *Santa Fe,* 168 F.3d at 823.

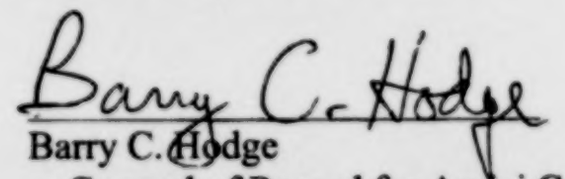
This is not what Establishment Clause jurisprudence should be about in this country. After all, as Justice Douglas said, in a much quoted passage from *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), "We are a religious people whose institutions presuppose a Supreme Being."

Therefore, this Court should flatly reject the "solemnization test" employed by the *Santa Fe* court. This Court should avail itself of this opportunity to strengthen and clarify its Establishment Clause jurisprudence. It should not approve *Santa Fe*'s jurisprudence of hostility. This Court should slam the door on a "jurisprudence" that is nothing more than judges' opinions as to what events they think are solemnizable.

CONCLUSION

For the foregoing reasons, the Fifth Circuit's decision should be reversed.

Respectfully submitted
this 29th day of December, 1999.



Barry C. Hodge
Counsel of Record for Amici Curiae
The National Legal Foundation
11521-E Midlothian Turnpike
Richmond, VA 23235
(804) 897-2340

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IN THE

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

JANE DOE, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILDREN, JANE AND JOHN DOE; JANE DOE, #2, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILD, JOHN DOE; AND JOHN DOE, INDIVIDUALLY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF STUDENT PRESS LAW CENTER, *AMICUS CURIAE*, IN SUPPORT OF NEITHER PARTY

RICHARD A. SIMPSON *
SAM R. HANANEL
AMY LEDOUX
ROSS, DIXON & BELL, L.L.P.
601 Pennsylvania Ave., N.W.
North Building
Washington, D.C. 20004-2688
(202) 662-2000

S. MARK GOODMAN
MICHAEL HIESTAND
STUDENT PRESS LAW CENTER
1815 N. Fort Myer Drive
Suite 900
Arlington, Virginia 22209-1817
(703) 807-1904

Attorneys for *Amicus Curiae*
Student Press Law Center

* Counsel of Record

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF STUDENT PRESS LAW CENTER, *AMICUS CURIAE*, IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS CURIAE[1]

The Student Press Law Center ("SPLC") is a national, not-for-profit, incorporated, legal research, information

[1] Both Petitioner and Respondent have consented to the filing of this brief. No person or entity other than the Student Press Law

and advocacy organization formed for the purpose of educating high school and college journalists about the importance of the First Amendment and defending their free press rights. Since its founding in 1974 by professional journalists and journalism educators, the SPLC has collected information on freedom of expression, freedom of information and other media-related legal issues of interest to the student press and has produced numerous publications on these topics. Among those issues is the effort by school officials at high schools, colleges and universities to censor student speech, including student expression on religious issues, in the context of school-sponsored activities such as student media. As the only national organization devoted exclusively to student press freedom, the SPLC acts as a source of free information for student journalists, and in 1998, for example, provided assistance to nearly 1,600 student journalists, their advisers and interested others. The SPLC has submitted numerous *amicus curiae* briefs to courts around the country, including briefs before this Court in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

The Court's decision in this case will have a direct impact on the manner in which high school officials around the nation interpret the Establishment Clause of the United States Constitution. Indeed, the SPLC has received numerous requests for assistance from student journalists who have had a wide range of religious material censored from their school-sponsored publications because of school officials' concerns about Establishment Clause violations. Because of the effect this case will have

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Center, its supporters, or its counsel has made a monetary contribution to the preparation or submission of this brief.

on the ability of students to express themselves on religious issues in a variety of school-related contexts, including student publications and other student media, *amicus* has a strong interest in the outcome of this case.

STATEMENT OF THE CASE

Amicus adopts the statement of the facts of the case as presented by the Court of Appeals in its decision.

SUMMARY OF ARGUMENT

In this case, the Court is asked to decide whether petitioner's policy permitting student-initiated, student-led prayer at football games violates the Establishment Clause of the First Amendment. Without taking a position on the constitutionality of the particular policy implemented by the Santa Fe School Board, *amicus* focuses on potential ramifications that a broad affirmance of the holding by the United States Court of Appeals for the Fifth Circuit might have on student religious expression in the context of school-sponsored student media. *Amicus* asks the Court to make clear that—whether or not petitioner's policy violates the Establishment Clause—where students initiate and control the content of religious expression in the context of student media, such religious expression does not violate the Establishment Clause.

ARGUMENT

WHETHER OR NOT THE COURT CONSIDERS STUDENT-INITIATED AND STUDENT-LED PRAYER AT A HIGH SCHOOL FOOTBALL GAME TO BE A VIOLATION OF THE ESTABLISHMENT CLAUSE, STUDENT RELIGIOUS EXPRESSION IN THE CONTEXT OF SCHOOL-SPONSORED STUDENT MEDIA WOULD NOT CONSTITUTE SUCH A VIOLATION

In holding petitioner's policy permitting student-initiated, student-led prayer at football games (the "Football Policy") unconstitutional, the Court of Appeals found that

the type of event at issue was controlling. Football games, the Court of Appeals found, are "hardly the sober type of annual event that can be appropriately solemnized with prayer." *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 823 (5th Cir. 1999), *reh'g denied*, 171 F.3d 1013 (5th Cir. 1999), *cert. granted in part*, 120 S. Ct. 494 (Nov. 15, 1999) (No. 99-62). Distinguishing its holding in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), which upheld a policy allowing student-selected, student-given, nonsectarian prayers at high school graduations, the Court of Appeals found that the non-solemn setting of football games could not constitutionally support prayers read over a public address system. *Doe*, 168 F.3d at 823.

Because the record appears unclear regarding whether the religious expression at issue here truly was student-initiated, *amicus* does not take a position on the outcome of the case. However, if the Court agrees that the analysis used by the Court of Appeals controls the issue before it, or determines that the Football Policy violates the Establishment Clause under some other analysis, the Court should be sensitive to the implications of such a holding for other situations. Such a holding should not in any way preclude students from expressing religious ideas in the context of school-sponsored student media. That is, whether the Court upholds the conclusion that student-initiated prayer at "frequently-recurring, informal, school-sponsored events" runs afoul of the Establishment Clause, *see Doe*, 168 F.3d at 823, that finding should not be interpreted as preventing students from publishing articles on religious issues or opinion pieces on personal religious beliefs in the student newspaper, yearbook, online publication or any other student-edited media.

Already, the SPLC has received numerous requests for assistance from student journalists who have had

a wide range of religious material censored from the pages of their school-sponsored student publications because of school officials' concerns about Establishment Clause violations. Student yearbook staffs have been told they could not include a picture of the Fellowship of Christian Athletes in the organization section of their publication. Editors of student newspapers have been prohibited from publishing feature stories about religious holiday celebrations of people of different faiths. Some have even been told that they cannot mention the word "Christmas" in the pages of their publication. Student-edited magazines have been punished because they accepted advertisements for local churches or religious youth groups.

In each of these cases, the student editors or staff of the publications wanted to publish the material in question. But school officials, solely because of the fear of Establishment Clause lawsuits, forbade them from doing so.

The nature and purpose of the student media often will distinguish such speech from student expression in other contexts. First, student journalists, acting on their own, are not state actors and, thus, their conduct cannot violate the Establishment Clause. Second, the government may not discriminate against speech solely on the basis of its religious viewpoint.

A. Because Student Journalists, Acting on Their Own, Are Not State Actors for Purposes of the First Amendment, Student Publication of Religious Expression Does Not Violate the Establishment Clause

Student writers and editors on school-sponsored student publications are not state actors when their editorial judgment is not attributable to school officials. *Yeo v. Town of Lexington*, 131 F.3d 241, 250 (1st Cir. 1997), *cert.*

denied, 118 S. Ct. 2060 (1998) (no state action in refusal of high school student newspaper and yearbook editors to publish advertisements where students exercised "independent" editorial judgment); *Sinn v. The Daily Nebraskan*, 829 F.2d 662, 665 (8th Cir. 1987) (no state action in refusal of student newspaper editors to print advertisement); *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996) (complaint did not provide plausible basis for inferring student editors were state actors in rejecting advertisement); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976) (no state action where university officials did not exercise supervision or control and students selected the newspaper's editor). Unless there is state action, courts may not impose constitutional obligations on private actors. *Yeo*, 131 F.3d at 248-49. Thus, there can be no violation of the Establishment Clause where the speech at issue is purely private speech. Although the analytic models used in state action decisions vary depending on the claims asserted, "[t]he essential state action inquiry is whether the government has been sufficiently involved in the challenged actions that it can be deemed responsible for the plaintiff's claimed injury." *Id.*

As this Court has recognized, even when students are in the public schools, they are private citizens. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). Only under limited circumstances do their actions become attributable to the state. Every court of appeals to consider the question of whether student-controlled editorial decisions are attributable to public officials has found no state action. *Yeo*, 131 F.3d at 250; *Sinn*, 829 F.2d at 665; *Leeds*, 85 F.3d at 55; *Mississippi Gay Alliance*, 536 F.2d at 1075. For example, in *Yeo*, the court found that the decisions made by high school student editors not to publish certain advertisements did not involve state

action where (i) the students made and controlled the decisions; (ii) the school administration had no legal duty to control the content of the editorial judgments of the student editors; and (iii) the actions by the students were not "fairly attributable" to the school. This was so even though the decisions took place in a public school setting, the student publications received some governmental funding, teachers were acting as advisers to the publications, and the school administrators made an educational judgment to respect the students' independent editorial decision. *Yeo*, 131 F.3d at 251-54.

Similarly in *Leeds*, the court found no state action in connection with a decision by a student editor of a state-supported law school newspaper to refuse to publish an advertisement. "[T]he state must have exerted its coercive power over, or provided significant encouragement to, the defendant before the latter will be deemed a state actor." *Leeds*, 85 F.3d at 54. Even where a student newspaper receives significant public funding, no state action exists where the paper maintains editorial freedom from the state. *See Sinn*, 829 F.2d at 665; *see also Mississippi Gay Alliance*, 536 F.2d at 1075.[2]

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[2] While the *Leeds*, *Sinn*, and *Mississippi Gay Alliance* cases occur at the college level, they remain relevant and persuasive in the high school context where students are given autonomy similar to that enjoyed by university students. *See Yeo*, 131 F.3d at 251. The holding of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), does not alter this analysis. While *Hazelwood* determined that a public high school *may* exercise content control over a student newspaper under certain, limited circumstances, it did not *mandate* that administrators do so. Certainly, school administrators concerned about fostering democratic principles through the teaching of journalism skills will choose to establish editorially independent student media. *See Yeo*, 131 F.3d at 250 (Determination by school officials that "the best way to teach journalism skills is to respect in the students' editorial judgments a degree of autonomy similar to that exercised by professional journalists. That choice by the officials parallels the allocation of responsibility for editorial judgments made by the First Amendment.").

It is clear that where students control the content of school-sponsored media, no state action is involved. Even where the student media bears the imprimatur of the school—for example, because the publication is identified as being affiliated with the school, the publication receives funding from the school, or the students produce the publication on school grounds—there is no state action if the students exercise editorial judgment independently of faculty members or the school adminstration. *See Yeo*, 131 F.3d at 250 (recognizing that state action analysis does not turn on whether school-sponsored activity bears imprimatur of school). Therefore, if students decide to include religious expression in a student publication, that decision would not involve state action and would not violate the Establishment Clause.[3] Of course, in order to avoid Establishment Clause problems, the expression must truly be student-initiated and student-led. A "sham" system in which school officials retain ultimate control over student expression would not pass constitutional muster.

B. Even If State Action Is Implicated, the Government May Not Discriminate Against Speech Solely on the Basis of Its Religious Viewpoint

Student religious expression in the context of student media may not be prohibited or limited because to do so would constitute viewpoint discrimination. This Court has consistently held that the government may not rely on the Establishment Clause to restrict religious speech based on viewpoint when the government has created any kind of forum for the expression of privately held views. *See, e.g., Rosenberger v. Rector & Visitors of*

[3] Moreover, religious expression in student media should not be restricted to "nonproselytizing, non-sectarian opinions," a standard which has no basis in this Court's Establishment Clause precedent.

the Univ. of Va., 515 U.S. 819, 837-46 (1995) (holding that public university unconstitutionally excluded a religious viewpoint when it denied funding to a Christian student newspaper); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395-97 (1993) (holding that a public school could allow after-hours access to its facilities to a religious organization when the school had made its facilities available to a wide variety of organizations); *Board of Education of Westside Community Sch. v. Mergens*, 496 U.S. 226, 247-53 (1990) (plurality) (holding that a high school could permit a student to form a Christian club subject to the same privileges and conditions as other school clubs); *Widmar v. Vincent*, 454 U.S. 263, 270-77 (1981) (holding unconstitutional a university policy prohibiting student religious groups from using university facilities).

Most recently, the Court confirmed that the neutrality of a government program is a "significant factor in upholding [it] in the face of Establishment Clause attack." *Rosenberger*, 515 U.S. at 839. In *Rosenberger*, the Court held that the University of Virginia's denial of student activities funds to a Christian student newspaper was "viewpoint discrimination" prohibited by the First Amendment. *Id.* at 845. With regard to the university's argument that funding the Christian newspaper would violate the Establishment Clause, the Court held that "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.* at 839.

In contrast to the Football Policy struck down by the Fifth Circuit, a school policy allowing students the freedom to discuss religious, political or social issues in student publications satisfies the neutrality requirement set

forth in *Rosenberger*.[4] Permitting free expression of religious viewpoints in the student media is neutral because it is not intended to advance religion but instead has the secular purpose of "open[ing] a forum for speech," *Rosenberger*, 515 U.S. at 840, in order to further the school's educational mission. *See Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287 (4th Cir. 1998) (holding that school board policy permitting private political, religious and social organizations to set up tables on school property and give away informational literature to students, including Bibles and other religious material, was adopted for secular purpose of opening a forum for speech). This Court has repeatedly held that an "open-forum policy, including nondiscrimination against religious speech, [has] a secular purpose." *Widmar*, 454 U.S. at 271 (footnotes omitted); *Mergens*, 496 U.S. at 248 (plurality). Whether a student writes an article about the celebration of Christmas, Hanukah or Ramadan, an opinion column about the experience of being "born again," or a letter to the editor espousing the virtues of atheism, the school will not be viewed as elevating any particular religious speech to a preferred status.

Unlike formal commencement exercises or sporting events, student publications are designed to be forums for the expression of diverse opinions on any subject matter that interests student writers. Readers of a student newspaper or magazine can evaluate the information and arguments presented therein, and those who disagree may respond by writing letters, opinion columns or other articles that express divergent viewpoints. As

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[4] The degree of solemnity in a school-sponsored activity—critical to the Court of Appeals' decision to strike down the Football Policy, *see Doe*, 168 F.3d at 823—should not be a factor in determining whether allowing students to engage in religious expression in student publications violates the Establishment Clause.

long as the religious content of such publications is dictated solely by students, a public school would not violate the Establishement Clause by permitting publication on a religion-neutral basis, even if students choose to publish articles discussing religious issues or columns espousing particular religious beliefs. *See Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1297-98 (7th Cir. 1993) (school district policy prohibiting students from distributing religious materials violated First Amendment). Therefore, while the secular purpose of encouraging students to deliver formal prayers during football games may be questionable, *see Doe*, 168 F.3d at 812, the secular purpose of permitting a broad range of religious discussion in the student media is clear.

A school also can eliminate any mistaken impression that articles, editorials or columns appearing in student-produced media represent the views or endorsements of school officials. The Court stated in *Mergens* that "[t]o the exent a school makes clear that its recognition of [a student religious club] is not an endorsement of the views of the club's participants, students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech." *Mergens*, 496 U.S. at 251 (plurality) (citation omitted). The Court in *Mergens* acknowledged that treating the speech of religious clubs at a high school as private religious expression would permit the clubs "access to the school newspaper, bulletin board, the public address system, and the annual Club Fair." *Id.* at 247, 250-51. Significantly, the Court did not find that this access to student media by student religious organizations would constitute government endorsement of religion. *Id.*

In *Rosenberger*, as well, the Court concluded that the university did not foster any mistaken impression that the

views printed in the student publications it funded were its own; the university explained to student publishers that funding should not be misinterpreted as responsibility for, or approval of, content. *Rosenberger*, 515 U.S. at 823-24. The university also required students to publish a written disclaimer indicating that the publications were independent of the university. *Id.* Similarly in a high school setting, administrators can stress that decisions regarding the content of newspapers, yearbooks and other student-produced publications are left solely to the students. *See Mergens*, 496 U.S. at 250-51 (recognizing that secondary school students are capable of distinguishing between a school's equal access policy and active school endorsement of religion); *Wauconda*, 9 F.3d at 1298-1300 (finding that even junior high school students could appreciate the distinction between public and private religious speech).

Finally, a school's decision to allow students to express their views on religion in student publications in no way coerces or pressures students to participate in a religious activity. *See Mergens*, 496 U.S. at 261 (Kennedy, J., concurring in part and concurring in the judgment). The student media encompasses a full range of expressions, ideas and political and religious beliefs, which students are free to accept or ignore.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should not extend to student-initiated religious expression in student newspapers and other media.

Respectfully submitted,

RICHARD A. SIMPSON *
SAM R. HANANEL
AMY LEDOUX
ROSS, DIXON & BELL, L.L.P.
601 Pennsylvania Ave., N.W.
North Building
Washington, D.C. 20004-2688
(202) 662-2000

S. MARK GOODMAN
MICHAEL HIESTAND
STUDENT PRESS LAW CENTER
1815 N. Fort Myer Drive
Suite 900
Arlington, Virginia 22209-1817
(703) 807-1904

Attorneys for *Amicus Curiae*
Student Press Law Center

* Counsel of Record

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IN THE
Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

JANE DOE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF TEXAS PUBLIC SCHOOL STUDENTS, THEIR PARENTS, AND THE LIBERTY LEGAL INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

VIET D. DINH
SCOTT H. ANGSTREICH
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9000

JOHN L. CARTER *
VIET D. DINH, LLC
120 S. Fairfax St., Suite 300
Alexandria, VA 22314
(703) 549-0049

Counsel for Amici Curiae

* *Counsel of Record*

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QUESTION PRESENTED

Whether Petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici include Texas public school students,[2] some of whom are speakers who wish to deliver a message or invocation during the pre-game ceremony at home football games. They seek neither to clothe themselves in the garb of school administrators nor to deliver the school district's message, but rather to express their individual sentiments to solemnize the competition that has drawn together their community. They wish to have the opportunity, free from government control, to speak their own words, to deliver their own message, and, for some of them, to express their own faith. Some amici student speakers, if called upon, would use the opportunity to deliver a non-prayer message encouraging good sportsmanship and safety. The Fifth Circuit's decision invalidating the Santa Fe Independent

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[1] Letters indicating the parties' consent to the filing of this brief have been filed with the Clerk of the Court. This brief has not been authored in whole or in part by counsel for a party. No person, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Amici students include Mindy Ackermann, Jake Allen, Cody Avalos, Nikki Bonnet, Amber Brown, Benjamin Chase Brown, Brooke Boucher, Julie Bucher, Justin Bucher, Tiffanee Bullock, Daniel Calder, Joshua Calder, Mary Alice Cansino, Chris Carrell, Wanda Davis, Jay Doty, Sterling Doty, T.J. Douglas, Shantae Douglas, Tanisha Douglas, Cody Fails, Jarad Fails, Joe Fails, Billie Jo Fanning, Branda Fanning, Dondra Fanning, Katherine Furley, Krystal Gartside, Teri Hamilton, Jessica Holt, Taylor Holt, Shannon Hughes, Jennifer Jackson, Myka Jackson, Emily Kribbs, Torey Lasater, Emily Lilljedahl, Katy Lilljedahl, Sara Lilljedahl, Micha Monson, Amy Nix, Brawnson Oliver, Remington Oliver, Wes Parham, Faith Roberts, Chelsea Rhodes, R.J. Rhodes, Marlena Robinson, Caytlin Rose, Brad Smith, Sarah Smith, Steven Smith, Melanie Spikes, Jayci Underwood, Jeremy Underwood, Alan Ward, Leigh Ann Weems, Tamantha White, Laura Wilkinson, Jason Wilson, and Justin Wilson.

School District's Pre-Game Ceremony Policy has denied them that opportunity.

Amici also include students and parents[3] who attend football games and wish to hear an expression of faith during the pre-game ceremonies. They recognize that the games are community events that provide the town with the opportunity to acknowledge its unity and to praise the accomplishments of its youth. They also recognize that a football game is a potentially dangerous event, both on the field and in the stands, and for that reason share the school district's interest in solemnizing the game, promoting good sportsmanship and safety, and establishing the appropriate environment for competition. Solemn messages, some in the form of prayers, delivered by a private individual—their friend, classmate, son, daughter, or neighbor—rather than a state official further those collective interests. The Fifth Circuit's decision has denied amici the opportunity to receive such an expression of private faith and to promote safe and healthy athletic competition.

Amicus Liberty Legal Institute is an organization committed to the defense of religious liberty and the protection of rights

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[3] Amici parents include Andy and Michelle Ackermann, Cindy Allen, Rudy Avalos, Melanie Black, Donna Bonnet, Michael Boucher, Keith Brown, Larry Wayne Brown, James M. Bucher, Doug Burns, Roderick Calder, Brandon and Cindy Carrell, Wanda Davis, Bob Doty, Lola Douglas, Kent Fails, Tim Fails, Robin Fanning, Kay Gartside, Patricia L. Hale, Cindy Holt, Lisa Hughes, Debbie Jackson, James Jackson, Denise Kribbs, Janet Lasater, Carl and Karen Lilljedahl, Ronda Monson, Lee Moore, Jan Nix, Ronnie and Mischelle Oliver, Margie Rhodes, Deborah Robinson, Lisa Rose, Carl W. Smith, Kenneth Smith, Terry Smith, Lanny Spikes, Sari Underwood, Gary Ward, Rodger Weems, Peggy Wilkinson, R.P. Wilson, and Tracey Wilson.

under the First and Fourteenth Amendments. Among its activities, the Institute assists individuals, students, and organizations in challenging state restrictions on, or discriminatory treatment on the basis of, religious beliefs or expression. By eliding the distinction between private conduct and state action, the Fifth Circuit has circumscribed the ability of the Institute to enable its clients to express their beliefs and exercise their faiths. Through other fundamental errors of law, the Fifth Circuit has frustrated the Institute's interest in an interpretation of the First and Fourteenth Amendments that properly balances the Establishment, Free Exercise, and Free Speech Clauses.

STATEMENT OF THE CASE

Amici hereby adopt the statement of the case presented in the Brief for Petitioner. For the Court's convenience, amici set forth below the facts most salient to the analysis that follows.

1. The Santa Fe Independent School District adopted in October 1995 the contested Pre-Game Ceremony Policy, which reads in pertinent part:

> The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation

> will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

Pet. App. F1.

This policy establishes a four-step process. First, the student council administers an election in which the student body determines, by secret ballot and majority vote, whether to have a student speaker during the pre-game ceremony at home football games. Second, if a majority of students votes in favor of a student speaker, then any student may volunteer as a candidate to deliver the speech. Third, the student council administers a second election in which the student body, by secret ballot and plurality vote, selects a student speaker from the volunteers. Fourth, the student selected will draft and deliver a speech consistent with the goals of the policy: solemnizing the event, promoting sportsmanship and safety, and establishing an appropriate environment for the competition.

2. The school district developed its Pre-Game Ceremony Policy pursuant to a district court order in this litigation, which prohibited any campaigning on school property during the student elections. The district court order likewise prohibited the school district from exercising any scrutiny of or control over the speech the selected student chooses to deliver. See *Doe* v. *Santa Fe Indep. Sch. Dist.*, No. G-95-176, at 6 (S.D. Tex. May 10, 1995) (interim order); *Doe* v. *Santa Fe Indep. Sch. Dist.*, No. G-95-176, at 1-2 (S.D. Tex. Aug. 17, 1995) (interim order pertaining to prayer at football games). There is

no record evidence of the results of any student votes, or the content of any messages or invocations given at football games, under the contested policy.

3. The Pre-Game Ceremony Policy also provides that should a court enjoin the enforcement of the contested policy quoted and described above, an alternative policy "will automatically become the applicable policy of the school district." This alternative is identical in relevant respects to the contested policy but for one additional sentence: "Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing." Pet. App. F1-F2.

SUMMARY OF ARGUMENT

This case turns on a simple yet fundamental axiom of Establishment Clause jurisprudence: "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Ed. of Westside Community Sch.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion). Any religious content in the student-initiated, student-led, and student-controlled message or invocation under the contested policy results from wholly private conduct, not state action. The school district merely authorizes the students to choose whether to have a message or invocation during the pre-game ceremony and permits the student speaker to choose the content of her message or invocation. Under established principles of constitutional law, such authorization and permission do not constitute state action.

Because students initiate, lead, and control the message or invocation during the pre-game ceremony, a reasonable observer would not perceive any government endorsement of any

religious content in the message or invocation. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250 (plurality opinion). Students select the speaker from their peers according to secular criteria, without any involvement by or encouragement from the school district. The school district's policy enabling the students to initiate, lead, and control the message or invocation contains an express statement of secular purposes. Thus, any "aid to religion at issue here is the result of [amici's] private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief." *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

Indeed, far from being a violation of the Establishment Clause, petitioner's Pre-Game Ceremony Policy charts a sensible and reasonable course between, on the one hand, the students' and parents' interest in delivering and receiving an expression of solemnity or private faith to promote friendly competition and, on the other, the constitutional prohibitions against excessive entanglement with religion and viewpoint discrimination. Invalidating the contested policy would require the school district, under the alternative policy, to police student messages and censor sectarian and proselytizing words from student prayers; such actions would raise the specter of impermissible viewpoint discrimination and excessive state entanglement with religion. Invalidating the Pre-Game Ceremony Policy in its entirety, as the Fifth Circuit did, would deprive amici and the school district of the opportunity to further, "in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of

what is worthy of appreciation in society." *Lynch* v. *Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

ARGUMENT

I. Any Religious Content in the Student-Initiated, Student-Led, and Student-Controlled Pre-Game Message Would Result from Private Choices and Not State Action.

"[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (plurality opinion). For that reason, nothing in the Constitution "prohibits public school students from voluntarily praying at any time before, during, or after the schoolday." *Wallace* v. *Jaffree*, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring in the judgment). Just so here, where any religious content in the pre-game ceremony results from the voluntary choices of the student body and individual student speakers.

A. The School District Does Not Control, Direct, or Influence the Content of the Message or Invocation, but Simply Permits the Students To Decide Whether and What Message They Would Voluntarily Convey.

Amici student speakers volunteer to participate in pre-game ceremonies in order to speak their own words, to deliver their own message, and, for some, to express their own faith. They seek not to become mouthpieces for the state, to relay the government's message, or to have the school's imprimatur on their sentiments. Indeed, to don the garb of a school administrator or to permit the school to adopt, co-opt, or endorse their message would defeat the purpose of the amici student speak-

ers' participation in a pre-game ceremony. That purpose is to express, in accordance with their personal beliefs, their own solemn sentiments for the occasion and their thoughts on the competition about to take place on the field.

Any religious content in amici student speakers' message, therefore, will be the "'result of the genuinely independent and private choices of' individuals," and not of any decision of the school or the state. *Agostini* v. *Felton*, 521 US. 203, 226 (1997) (quoting *Witters*, 474 U.S. at 487).

Student amici seek simply to exercise the freedom conferred upon them through policies like the Pre-Game Ceremony Policy. Under that policy, students have complete freedom over the message or invocation during the pre-game ceremony. They are free, as a group, to decide whether a message or invocation will be delivered at all. Each student is free to decide whether to volunteer as the speaker. The student body is free to choose the speaker from those volunteers. Finally, the student elected to speak is free to choose the content of the message or invocation she delivers in accordance with the secular goals and purposes of the policy—including to choose whether to convey that message through expressions of private faith.[4] Any endorsement of religion offered by a student speaker, should she

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[4] The Pre-Game Ceremony Policy permits the student speaker to deliver a "message and/or invocation." Although someamici student speakers openly desire to express themselves during the pre-game ceremony through prayer, the term "message" carries no religious connotation and an invocation need not contain religious content. See *Doe* v. *Santa Fe Indep. Sch. Dist.*, 171 F.3d 1013,1015 (5th Cir. 1999) (Jolly, J., dissenting from denial of rehearing en banc). Indeed, some amici student speakers would not offer prayers in their messages should they be selected as a student speaker

be elected by her peers, would be free from government involvement because the policy provides the school district with no mechanism to control the content of the speech.[5] The pre-game ceremony, therefore, would feature student-initiated, student-led, and student-controlled speech, which may, but need not, take the form of prayer.

In the typical student religious speech case addressed by the Court, the school has created a program whereby it grants access to school facilities, services, or funds to a variety of student activities on a nondiscriminatory basis. See *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Mergens*, *supra*; *Widmar* v. *Vincent*, 454 U.S. 263 (1981). Emphasizing that the First Amendment commands neutrality and not hostility toward religion, the Court has consistently invalidated any attempt to restrict access to these school programs on the basis of the religious content of the student activity. See *Rosenberger*, 515 U.S. at 845-46; *Lamb's*

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[5] Under the policy, the student speaker "may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy." The district adopted the policy pursuant to a court order requiring that student messages "not be subject to scrutiny or pre-approval by the District or the School Administration." *Santa Fe*, No. G-95-176, at 6 (interim order); *Santa Fe*, No. G-95-176, at 1-2 (interim order pertaining to prayer at football games). The school district thus may not review the content of student messages. Even if this policy were nonetheless interpreted to permit the school district to determine *ex post* whether the student speech was consistent with the goals of solemnity, sportsmanship, and healthy competition—for example, to ensure that the student's speech contains neither profanity nor personal attacks—the policy in no way authorizes the school district to scrutinize or control the religious content of the student speech.

Chapel, 508 U.S. at 393-94; *Mergens*, 496 U.S. at 248 (plurality opinion); *Widmar*, 454 U.S. at 277. That result holds even in a hard case, where faithful application of the neutrality principle brushes up against a competing constitutional norm. See *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring) ("This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities.").

This is not that hard case of neutral government action. It is the easy case of no government action at all. This case presents a straightforward application of the Court's unanimous decision in *Witters* v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986). There, the Court held that state funds supporting vocational training for the blind could be used for tuition at the Inland Empire School of the Bible because "vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices or aid recipients." *Id.* at 487. Therefore, "it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion." *Id.* at 488.

Indeed, the contested policy in this case distances the private choices of the students from governmental action even further than the facts presented in *Witters*. In *Witters*, there was one intervening act of private choice—the decision by Mr. Witters to attend a religious school and thus to endorse the school's religious teachings. Here, there are several intervening private decisions by the student actors. First, under the Pre-Game Ceremony Policy, the students choose whether to include a

message or invocation in the pre-game ceremony. If they do not wish to include such message or invocation, there would be no religious endorsement, private or otherwise, in the pre-game ceremony. Second, should the student body choose to have a message or invocation, individual students, like amici student speakers, may choose whether to volunteer as a prospective student speaker. Third, the students would then choose a speaker from the student volunteers. The student body makes this choice without foreknowledge of the messages or invocations each volunteer plans to give throughout the season. Indeed, the school prohibits on-campus campaigning by or on behalf of individual volunteers and thus ensures that the religious content of future messages or invocations would not be a factor during the selection process.

Finally, the selected student speaker chooses what to say in her message or invocation. She retains complete control over the religious content, or lack thereof, of the speech she is to give. This last intervening step, the student speaker's independent decision whether to invoke religious themes, is analogous to the private decision whether to attend a religious school in *Witters*. The Court held in *Witters* that the single intervening private action meant that "the decision to support religious education is made by the individual, not by the State." *Id.* This unanimous holding means *a fortiori* that the multiple intervening private decisions here render any endorsement of religion the result of private choices made by the students, not by the State.

Lee v. *Weisman*, 505 U.S. 577 (1992), is not to the contrary. The graduation prayer in that case violated the Establishment Clause because it "bore the imprint of the State." *Id.* at 590. There, the school principal decided that the graduation ceremony would include an invocation and a benediction; he chose

the religious figure to give those speeches; and he "directed and controlled the content of the prayers." *Id.* at 587-88. In these three ways, the school substantially involved itself in the graduation prayer. Here, students decide whether to have a message or invocation; students select the speaker from their peers to deliver the message or invocation; and the student speaker chooses and controls the content of the message or invocation. In each way the school controlled the prayer offered in *Lee*, therefore, Petitioner has renounced control here.

Three Justices recognized in *Lee* that "[i]f the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State." *Id.* at 630 n.8 (Souter, J., concurring, joined by Stevens & O'Connor, JJ.) (citing *Witters*, *supra*). Under the contested policy, student speakers would be selected according to secular criteria and would choose individually whether to deliver a religious message. And the message or invocation that the student speakers would deliver is even more free from government control than that hypothesized by the concurring Justices in *Lee*: It is the students, not the school, who would decide whether to have a message or invocation in the first place. In short, any endorsement of religion that the student speakers may offer during the pre-game ceremonies would result from the private choices of the students, with no input, interference, or control by the administration.

B. The Court's State Action Jurisprudence Under the Due Process Clause of the Fourteenth Amendment Reinforces the Crucial Distinction Between Private Expression and State Endorsement Under the First Amendment.

The distinction between private choice and state action here parallels the Court's jurisprudence applying the Due Process Clause of the Fourteenth Amendment.[6] In that context, "the conduct of a private actor is not subject to constitutional

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[6] The question presented is whether the district's Pre-Game Ceremony Policy violates the Establishment Clause, and that clause applies to the States only through its incorporation into the Due Process Clause of the Fourteenth Amendment. See *Everson* v. *Board of Ed. of Township of Ewing*, 330 U.S. 1, 15 (1947); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940). Accordingly, cases distinguishing private decisions from state action for purposes of the Fourteenth Amendment reinforces the analysis here. See *United Bhd. of Carpenters & Joiners of Am., Local 610* v. *Scott*, 463 U.S. 825, 832 (1983) (holding that because the First Amendment is binding upon the states through the Fourteenth Amendment's Due Process Clause, "a conspiracy to violate First Amendment rights is not made out without proof of state involvement"); *Montano* v. *Hedgepeth*, 120 F.3d 844, 848 (8th Cir. 1997) (same for a Free Exercise claim). Finding state action concomitant with a private decision, however, is a necessary but not sufficient condition for an Establishment Clause violation. Only if the state action also constitutes endorsement of religion or leads to excessive entanglement with religion has a violation occurred. See John H. Garvey, *The Architecture of the Establishment Clause*, 43 WAYNE L. REV. 1451, 1461-62 (1997). Requiring state endorsement or excessive entanglement, in addition to state action under the Due Process Clause, ensures that the rights of private individuals under the Free Exercise and Free Speech Clauses are given sufficient protection.

challenge if such conduct is 'fundamentally a matter of private choice and not state action.'" *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 409 (1995) (O'Connor, J., dissenting) (quoting *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting)).[7] That is so because of the essential dichotomy "between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (quoting *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948)) (citing *The Civil Rights Cases*, 109 U.S. 3 (1883)). The purpose of the Fourteenth Amendment "was to protect the people from the State, not to ensure that the State protected them from each other," *DeShaney* v. *Winnebago County Dep't of Social Serv.*, 489 U.S. 189, 196 (1989), and the state action requirement ensures "that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982).

The school district in this case simply authorizes and acquiesces in the students' private choices, and "[m]ere approval of or acquiescence in the initiatives of a private party

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[7] Similarly, with respect to the Equal Protection Clause of the Fourteenth Amendment, this "Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever." *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972); see also *Reitman* v. *Mulkey*, 387 U.S. 369, 380 (1967) (stating that private discrimination violates the Fourteenth Amendment only when the State has "significantly involved itself with invidious discriminations").

is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum*, 457 U.S. at 1004-05; accord *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 547 (1987); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 164 (1978). Students are not employees or designated agents of the state; they are private individuals seeking to engage in private action. Under the contested policy, students choose whether to have a speech, whether to run for the position of speaker, who to have as the speaker, and whether to include religious content in the speech. But for each of these private decisions, there would be no religious content in the pre-game message or invocation. In this entire series of decisions, all of which are fundamentally a matter of the students' private choices, the only involvement of the school district is that it abides by their result.

Simply because the school district, by adopting the Pre-Game Ceremony Policy, has erected the platform on which amici student speakers would express their private sentiments, the district "does not thereby become responsible for all that occurs upon it." *Edmonson*, 500 U.S. at 632 (O'Connor, J., dissenting). Instead, the state "can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004; accord *Edmonson*, 500 U.S. at 632 (O'Connor, J., dissenting).[8] But the contested policy was

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[8] State action, of course, can also be found when "the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, *actually convey* a message of endorsement." *Capitol Square Review & Advisory Board* v. *Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part

adopted pursuant to a district court order prohibiting any on-campus campaigning during the student election or any school scrutiny of or control over the student speech. Therefore, the record indicates that the school district cannot coerce, encourage, or otherwise affect any private decision whether to infuse religious content into the message or invocation.

Finally, it is irrelevant to the state action analysis that the district exercises general control over other aspects of the pre-game ceremony. Although a school may determine, say, the time of the ceremony or the order of events, it exercises no specific control over the relevant action—the content of the message that a student speaker would deliver if elected by her peers. Under settled law, a regulated entity's decision constitutes state action only to the extent that the government actually regulates that specific decision. See *San Francisco Arts & Athletics*, 483 U.S. at 547 n.29; *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 841 (1982); *Moose Lodge*, 407 U.S. at 177-78; see also *Lebron*, 513 U.S. at 412 (O'Connor, J., dissenting) ("Although a number of factors indicate the Government's pervasive influence in Amtrak's management and operation, none suggest that the Government had any effect on Amtrak's decision to turn down Lebron's proposal."). Whatever control the district exercises over the pre-game ceremony generally, it has expressly disavowed any influence over the decision to have a student speech during that ceremony, over the selection of the speaker, and over the religious content of the speech. Thus, the student-initiated, student-led, and student-controlled prayer

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and concurring in the judgment). In this case, however, a reasonable observer could not view the school district's decision to permit students to speak during the pre-game ceremony as a state endorsement of religion. *See infra* Part II.

simply cannot be deemed state action violative of the Constitution.

II. Because Students Initiate, Lead, and Control the Message or Invocation During the Pre-Game Ceremony, a Reasonable Observer Would Not Perceive Any Government Endorsement of Any Religious Content in the Message or Invocation.

"The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250 (plurality opinion). Therefore, a reasonable observer would not perceive any impermissible state endorsement of religion from the pre-game message or invocation that students initiate, lead, and control. To avoid an Establishment Clause violation, it is important "that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). In this case, the school district has not sent "a message to nonadherents that they are outsiders, not full members of the political community." *Id.* at 688. It has not sent a message at all, other than that it respects the students' freedom to decide for themselves whether and what message they would voluntarily convey.

Expressions of faith by private individuals, of course, may be seen as an impermissible state endorsement of religion if the government has adopted or otherwise involved itself with the private speech. See, *e.g.*, *Rosenberger*, 515 U.S. at 841-42; *Wallace*, 472 U.S. at 60 n.51. Whether there is government endorsement of religion turns on the objective perception of a reasonable, informed observer, and not on the subjective intent of government actors. See *Capitol Square*, 515 U.S. at 773 (O'Connor, J., concurring in part and concurring in the judg-

ment, joined by Souter & Breyer, JJ.); *id.* at 799 (Stevens, J., dissenting, joined by Ginsburg, J.); see also *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. 573, 620 (1989) (Blackmun, J.); *id.* at 635-36 (O'Connor, J.); *id.* at 642-43 (Brennan, J., joined by Marshall and Stevens, JJ.). In some cases, the distinction between objective perception and subjective intent may well figure prominently. Compare *Capitol Square*, 515 U.S. at 765-67 (plurality opinion), with *id.* at 774-75 (O'Connor, J., concurring in part and concurring in the judgment.). That distinction is of little moment in this case, however, because no reasonable observer would perceive a state endorsement of the private expressions of faith in the student-initiated, student-led, and student-controlled message or invocation.

The Pre-Game Ceremony Policy neither prescribes nor proscribes religious speech. Instead, it permits students to decide whether to have speech, who among them would speak, and what to say. The Fifth Circuit's decision that such permission constitutes endorsement of religion ignores the fundamental distinction between government action and private conduct. It would make schools responsible for and thus force them to censor all speech that happens on school grounds. It would turn all student speakers at all school-sponsored events—whether homecoming dances, student government elections, or drama productions—into state actors for Establishment Clause purposes. A clearer threat of education by litigation and administration through obstruction could hardly be imagined.

Amici who attend football games share the school district's interest in solemnizing the event, promoting good sportsmanship and student safety, and establishing the appropriate environment for competition. As reasonable observers, "aware of the history and context of the community and forum,"

Capitol Square, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment), amici understand that the pre-game student message or invocation exists in order to further these secular objectives. They also understand that the school district has simply permitted students to decide whether to have a message or invocation, to select the speaker, and to choose the content of the message, and acquiesced in the students' decisions in those regards. They recognize that any religious content in the message or invocation results from the students' private decisions and actions—just as surely as they recognize that when a player scores a touchdown, it is his and his teammates' achievement and not the school's action, even though the players compete on a school gridiron, under school lights, and with school uniforms. They may applaud or disparage the effort (depending on which team scores) just as they may agree or disagree with the student's message or invocation, but they would not, and cannot reasonably, attribute the action to the school district.

First, any "aid to religion at issue here is the result of [amici's] private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief." *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in the judgment). Although a school may censor or punish student speech to "disassociate itself" from that speech and to ensure "that the views of the individual speaker are not erroneously attributed to the school," *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 271-72 (1988) (quoting *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 685 (1986)) (internal quotation marks omitted), the Fifth Circuit erred in adopting the converse proposition: "[W]hen the school 'permits' sectarian and proselytizing prayers . . . such 'permission' undoubtedly conveys a message not only that the government endorses

religion, but that it endorses a particular form of religion." *Doe* v. *Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 817-18 (5th Cir. 1999).

Permission cannot "undoubtedly" equal endorsement, for education cannot occur without space for student expression that is neither enjoined nor endorsed by the school. The existence of such a space is especially important with respect to religious speech, because the "Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee*, 505 U.S. at 589. Amici student speakers' message would fall within that space of permission, and a reasonable, informed observer would not conclude that the school had endorsed that speech. See *Mergens*, 496 U.S. at 250 (plurality opinion) ("The proposition that schools do not endorse everything they fail to censor is not complicated."); see also *Chandler* v. *James*, 180 F.3d 1254, 1261 (11th Cir. 1999) ("Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's—either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression.").

Second, the student speaker is selected according to secular criteria. Students make the initial decision whether to have a pre-game message or invocation, without encouragement or endorsement by the school. Any campaigning—secular or otherwise, by school officials or by students—would be prohibited. The opportunity to volunteer as a speaker-candidate in the subsequent election is available to all students, including some who want to pray and those, like some amici, who want to offer secular words in accordance with the goals and purposes of the policy. Such openness of the forum to a wide variety of

viewpoints properly informs the judgment whether the government had endorsed any religious message ultimately expressed. See, *e.g.*, *Rosenberger*, 515 U.S. at 850 (O'Connor, J., concurring); *Mergens*, 496 U.S. at 252 (plurality opinion); *Widmar*, 454 U.S. at 274. The competition to serve as speaker is open to all students on a nondiscriminatory basis, regardless of any future messages they may give.[9] And the students choose among the volunteer speakers without regard to the content of any future messages, for the simple fact that such information is not available because candidates are prohibited from campaigning on campus.

Third, the school district adopted the Pre-Game Ceremony Policy for three express secular purposes: "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Pet. App. F1. This express statement of the secular purposes behind government action should be reviewed deferentially. See *Edwards* v. *Aguillard*, 482 U.S. 578, 586 (1987); *Wallace*, 472 U.S. at 74-75 (O'Connor, J., concurring in the judgment); *Mueller* v. *Allen*, 463 U.S. 388, 394-95 (1983). Unmindful of the deference due and without any factual support, the Fifth Circuit declared the school district's express statement of

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[9] This is not the "harder case where religious speech threatens to dominate the forum." *Rosenberger*, 515 U.S. at 850-51 (O'Connor, J., concurring); accord *Capitol Square*, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in the judgment). The complaint is a facial challenge to a policy that has yet to go into effect, and there is no "empirical evidence that religious groups will dominate [the school's] open forum." *Widmar*, 454 U.S. at 275; see also *Bowen* v. *Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring) (denying a facial challenge because the contested statute "need not result in constitutional violations").

purpose to be a "sham." See *Santa Fe*, 168 F.3d at 816-17. But surely a school can believe that a short speech, say, to promote good sportsmanship is appropriate during a pre-game ceremony. If the school delegates to students the decision whether to have such a speech and who among them to speak, the secular purpose is not rendered a "sham" simply because a student speaker chooses to promote good sportsmanship through prayer. The lower court thus repeats here its erroneous "permission equals endorsement" approach, a mistake that no observer—at least no reasonable, informed observer—would make.

The school district's actions in adopting the Pre-Game Ceremony Policy evinced the exact opposite of an "intent to encourage children to choose prayer over other alternatives." *Wallace*, 472 U.S. at 77 (O'Connor, J., concurring in the judgment). The school district originally formulated, at the district court's direction, a Prayer at Football Games Policy permitting student "invocations." See *Santa Fe*, No. G-95-176, at 6 (interim order); *Santa Fe*, No. G-95-176, at 1-2 (interim order pertaining to prayer at football games). A few months later, the school district broadened that policy and allowed students to deliver secular "messages" and "statements." See Pet. App. F1-F2. Unlike the amendment to Alabama's moment of silence law invalidated in *Wallace*, which gratuitously reminded students of a pre-existing legal right to pray, see *Wallace*, 472 U.S. at 77, the school district here expanded the non-prayer opportunities available to the students. In addition, the district was simply attempting to advance its secular purposes in light of rapidly changing, confusing, and flatly contradictory pronouncements from different panels of the Fifth Circuit. Compare *Ingebretsen* v. *Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996), and *Doe* v. *Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995), with *Jones* v. *Clear Creek Indep. Sch. Dist. (Clear Creek II)*, 977 F.2d 963 (5th Cir. 1992);

see also *Doe*, 171 F.3d at 1016 (Jolly, J., dissenting from denial of rehearing en banc) ("Upon reading *Santa Fe*, *Ingebretsen*, and *Clear Creek II*, it seems, with regard to the Establishment Clause, that panels of our court pay little regard to previous jurisprudence. One might think that a specific holding of a prior opinion is no more than a puff of wind.").

Finally, that a student speaker may convey religious sentiments over a public address system at a school-sponsored event is of little moment in the endorsement analysis. "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker," *Capitol Square*, 515 U.S. at 786 (Souter, J., concurring in part and concurring in the judgment), especially where the school has renounced all involvement in and control over the individual's speech. See *Rosenberger*, 515 U.S. at 834-35 (noting the strict separation between the University and the student groups); *id.* at 849-50 (O'Connor, J., concurring) (same). The school district here adopted the Pre-Game Ceremony Policy with an express statement of secular purposes. Students select the speaker from their peers according to secular criteria. And any religious content in the message or invocation would result solely from the intervening exercise of private choices. On these facts, there is no reasonable inference that the State itself is endorsing a religious practice or belief.

Lee v. *Weisman*, again, is not to the contrary. In a high school graduation, "the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit." *Lee*, 505 U.S. at 597. A student speaker, selected by students, with complete control over her speech has no "state-imposed character." Moreover, the atmosphere of a football game differs from

that of a graduation in a number of significant ways. First, a football game is a community event, drawing in people who would not attend a graduation because they are neither students nor their relatives. Such public attraction and open attendance distance the event from identification with the school or its instructional mission. Second, graduation is the culminating event of a high school education, and thus a student has little practical choice whether to attend the ceremony. See *id.* at 595. By contrast, a football game is a noninstructional extracurricular activity—one, of course, that nevertheless has much formative value. Participation in such an activity and attendance at the event is truly an exercise of voluntary choice. Even if "the possibility of *student* peer pressure remains . . . there is little if any risk of official state endorsement or coercion when no formal classroom activities are involved and no school officials actively participate." *Mergens*, 496 U.S. at 251 (plurality opinion). Third, school officials at football games exercise significantly less control over "the timing, the movements, the dress, and the decorum of the students" than at a graduation. *Lee*, 505 U.S. at 597. Students are generally free to wear what they want, sit where they like, and do as they please. Indeed, this minimal level of control reinforces the school district's interest in promoting solemnity, student safety, and friendly competition—an interest that all amici who attend football games share.

III. The Pre-Game Ceremony Policy Reasonably Reconciles the School's and Amici's Interest in Promoting Private Expression Consistent with the Purposes of the Policy and the Constitutional Prohibitions Against Excessive Entanglement with Religion and Viewpoint Discrimination.

Far from violating the Establishment Clause, the school district's Pre-Game Ceremony Policy represents a sensible and reasonable reconciliation of the interests at stake. Amici have an interest in offering and hearing an expression of solemnity or private faith that promotes safe and friendly competition. The school district, although it does not share amici's interest in religious expression, shares their interest in establishing a solemn environment for the ensuing competition. In addition, the school district has an interest in offering its students experiences that will contribute to their personal growth, as reflected in the noninstructional extracurricular activities it sponsors and the opportunities it provides students to express themselves in public.

Most important, the school district has yet a third set of interests—compliance with the constitutional prohibitions against excessive entanglement with religion and viewpoint discrimination. The Establishment Clause proscribes the state from "excessive entanglements" with religion. See *Agostini*, 521 U.S. at 233. That prohibition requires neither hostility toward religion nor a complete lack of involvement in religious matters. The former would be as offensive to the Constitution as a preference for a particular religion. See, *e.g.*, *Mergens*, 496 U.S. at 248 (plurality opinion); *County of Allegheny*, 492 U.S. at 610-11; *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). The latter is impossible in a society such as ours, in which "church and state must necessarily operate within the same

community." *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring in the judgment); see *Agostini*, 521 U.S. at 233; *Lynch*, 465 U.S. at 672-73.

Moreover, the religious expression of amici student speakers "is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square*, 515 U.S. at 760. The district has enabled a student, with the support of her classmates, to offer a message solemnizing the event and promoting sportsmanship and safety; it cannot discriminate against her simply because she wants to express that message from a religious viewpoint. See *Rosenberger*, 515 U.S. at 828-32.

The Pre-Game Ceremony Policy charts a careful course through these competing interests without running aground on any of them. Indeed, by offering an opportunity for student-initiated, student-led, and student-controlled speech free from both state discrimination among viewpoints and state entanglement with religion, the policy charts the best course as compared to the two known alternatives.

First, invalidating the school district's contested policy would lead to the automatic implementation of the alternative policy, which requires the student message or invocation to be nonsectarian and nonproselytizing. This alternative raises the threat of a dual constitutional violation. First, the prohibition against sectarian and proselytizing speech may require school officials to discriminate among viewpoints and thereby to infringe the students' right to express themselves through religious speech. Second, by prompting the district to police student messages and censor sectarian and proselytizing words and sentiments from student prayers, the alternative policy threatens an excessive state entanglement in matters of religion.

The experience of amicus Katherine Furley (née Hackleman) illustrates the dual danger of excessive entanglement and impermissible viewpoint discrimination. Consistent with the Fifth Circuit's decision in *Santa Fe*, the Aledo Independent School District permits only "nonsectarian and nonproselytizing" prayers at graduation ceremonies. Appended to this brief is the text of Ms. Furley's proposed graduation speech, which she was required to submit to school officials for pre-clearance. School officials and their attorney reviewed the speech and censored words they considered to violate the prayer policy; their deletions are marked by strikeouts on the appended speech. Among the changes insisted by the school are the substitution of "God" for "Heavenly Father" and the deletion of the following: "Thank you for having a plan to prosper us and not to harm us. Lord as we open this ceremony we recognize before you our sin and ask you to renew us"; "Help us to lean on you for direction and follow in your footsteps. There is no good aside from you"; "Let us take on the likeness of you"; and, finally, "We love you." See *Furley* v. *Aledo Indep. Sch. Dist.*, at 2-3, No. 4:99-CV-0416-A (N.D. Tex. Oct. 20, 1999) (memorandum opinion and order).

These prior restraints not only evince a hostility toward religion but also underscore the elusive distinctions necessary to draw the line between ecumenical and sectarian prayers. How does "God" differ from "Heavenly Father"? Why is it permissible to look to Kant or Nietzsche for guidance but not to ask God to "[h]elp us lean on you for direction and follow in your footsteps"? And what, exactly, is wrong with saying, "We love you"? Allowing—nay, requiring—school officials to make these metaphysical judgments invites excessive entanglement with religion (God versus Heavenly Father) and impermissible viewpoint discrimination (God versus Nietzsche). Indeed, because the school has extensively censored the message, a

reasonable observer would likely attribute to the school the content of the prayer—which, even after editing, invokes God's help for guidance and protection and may constitute an endorsement of religion. Confronted with such a constitutional quagmire, a school district may well decide to eliminate opportunities for student speech—including for the secular messages that would be offered by some amici student speakers.

Second, the Fifth Circuit struck down the Pre-Game Ceremony Policy in its entirety on the startling ground that the messages or invocations "are to be delivered *at football games*—hardly the sober type of annual event that can be appropriately solemnized with prayer." *Santa Fe*, 168 F.3d at 823 (emphasis in original). Not only does this decision require the school district to engage in viewpoint discrimination and excessive entanglement[10] and thwarts the school's and amici's interest in promoting student expression, but it also rests upon an absurd mischaracterization of the event at which amici wish to speak.

The Fifth Circuit's opinion bespeaks a striking lack of appreciation for commonplace displays of solemnity during sporting events. The national anthem, for example, plays before

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[10] To ensure that a student speaker did not use religious words in violation of the Fifth Circuit's holding, a school official would have to stand ready to censor any such words as they are uttered or would have to punish their use after the fact. The school would thus treat student prayer and student profanity equally. The school district interpreted the Fifth Circuit's decision in just this manner. See Patty Reinert, *Battle Over School Prayer Moves to Football Fields*, HOUS. CHRON., Oct. 17, 1999, at 1 (State section) (reporting that school officials "threatened to punish any student who used the pregame 'message' to praise God, just as they would discipline a student who used the school's loudspeaker to utter a curse.").

the start of virtually every athletic contest; in a show of respect, players and spectators stand at attention while the anthem plays. Teams engage in rituals of sportsmanship before and after the game, with the athletes shaking hands to solemnize the competition. Finally, one need look only to international sporting competitions—say, the Olympics or the World Cup—to recognize the pomp and grandeur that accompany each contest of athletic skill.

A high school football game gathers together the community in support of healthy competition in a sport that promotes teamwork, leadership, and individual fortitude. It is a community event. Like all such events, the game presents the town with an opportunity to celebrate its unity and to recognize the accomplishments of its youth. It is an "occasion when many citizens feel the need for serious thoughts and words." *Santa Fe*, 168 F.3d at 835 (Jolly, J., dissenting). Private acknowledgments of religion during the pre-game ceremony serve, "in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring).

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Petitioner, the decision below should be reversed.

Respectfully submitted,

VIET D. DINH
SCOTT H. ANGSTREICH
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9000

JOHN L. CARTER*
VIET D. DINH, LLC
120 S. Fairfax St., Suite 300
Alexandria, VA 22314
(703) 549-0049

Counsel for Amici Curiae

December 29, 1999

**Counsel of Record*

APPENDIX

~~Heavenly~~ God Father we come before
you today to thank you for bringing us
to this great occasion. Thank you for
leading, guiding and protecting each
and every one of us. ~~Thank you for~~
~~having a plan to prosper us and not~~
~~to harm us. Lord as we open this~~
~~ceremony we recognize before you our~~
~~sins and ask you to forgive us.~~ Our
life now opens before us and we must now accept
responsibility for our decisions. ~~Help us~~
~~to learn of you for direction and follow~~
~~in your footsteps. There is no god aside~~
~~from you.~~ Help the class of 1999 to move on into
the world ~~forward~~ in strength and love for others.
~~Let us take on the likeness of you and~~
set an example for the world to follow.
Thank you for your love and thank
you for your guidance and protection at each
and every moment. ~~We love you.~~

~~[illegible]~~

Amen

DEC 29 1999

No. 99-62

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, Individually and as next of friend for her Minor Children, Jane and John Doe, Minor Children; and, JANE DOE #2, Individually and as next of friend for her Minor Child, John Doe, Minor Child, and John Doe, Individually,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF PETITIONER

DAVID M. FELDMAN
MYRA C. SCHEXNAYDER
Counsel of Record
FELDMAN & ROGERS, L.L.P.
Attorneys for Amicus Curiae
Coastal Banc Plaza
5718 Westheimer, Suite 1200
Houston, Texas 77057
(713) 960-6000

157020

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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Other Authorities:

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"Three Cheers for High School Football," *Texas Monthly Magazine*, Oct. 1999 6

The Texas Association of School Boards Legal Assistance Fund ("TASB LAF") respectfully submits this brief as *amicus curiae* in support of Petitioner Santa Fe Independent School District.[1]

INTEREST OF AMICUS

Nearly 750 public school districts in Texas are members of the TASB LAF, which advocates the positions of local school districts in litigation with potential state-wide impact.[2] The TASB LAF is governed by three organizations: the TASB, the Texas Association of School Administrators, and the Texas Council of Schools Attorneys.

The TASB is a non-profit unincorporated association of the public school districts of the State of Texas. Approximately 1,047 public school districts in the state, through their elected boards of trustees, have joined as members of TASB. The members of TASB are responsible for the governance of the public schools of Texas. *See* TEX. EDUC. CODE § 11.151(b) & (d).

The Texas Association of School Administrators represents the state's school superintendents and other administrators who are responsible for carrying out the education policies adopted by their local boards of trustees.

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1. The TASB LAF has received the consent of Petitioner Santa Fe Independent School District and Respondents Jane Doe and Jane Doe #2. The written consents of both parties are being filed herewith. Neither party authored this brief, in whole or part, or paid any of the costs of producing it.

2. See Appendix A for a list of participating school districts.

The Texas Council of School Attorneys is comprised of attorneys who represent more than ninety-percent of the public school districts in Texas.

The TASB Legal Assistance Fund urges this Court to reverse the decision of the court below. The Fifth Circuit's decision is too far-reaching in its condemnation of student-initiated, student-led, nonsectarian, nonproselytizing prayer at high school football games. TASB LAF maintains that a pre-game prayer policy modeled after the high school graduation Resolution upheld in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993), does not offend Establishment Clause protections.

SUMMARY OF ARGUMENT

A conflict has been raging in the public schools for more than a decade concerning the extent to which prayer can be permitted during certain school-related activities without running afoul of the Establishment Clause and its protections against state-sponsored religion. School districts, unfortunately, have been caught in the crossfire of two opposing camps: those who seek to freely exercise their religious beliefs in school-sponsored venues and those who seek to eradicate religious expression entirely.

In the face of such controversy, many school districts have had no choice but to develop and implement "prayer" policies that seek to achieve some balance between the competing interests. The Fifth Circuit Court of Appeals approved of one such policy in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) ("*Clear Creek II*"). In that

decision, the court upheld a policy permitting the inclusion of student-led, student-initiated invocations or benedictions in high school graduation ceremonies, so long as the prayer is both nonsectarian and nonproselytizing in nature.[3] The Fifth Circuit's decision in *Clear Creek II* has since served as a reference point for school boards across the country in their efforts to afford those who wish to pray during school-sponsored events the opportunity to do so in a manner that does not offend the Establishment Clause.

In an apparent attempt to take the Santa Fe Independent School District to task for attempting to eliminate the "nonsectarian, nonproselytizing" element from its prayer policies, the Fifth Circuit's decision below unduly restricts the holding and analysis in *Clear Creek II* to high school graduation ceremonies. For the reasons set forth below, *amicus curiae* urges this Court to reverse, at a minimum, that portion of the Fifth Circuit's decision holding that a *Clear Creek*-type policy cannot be extended to high school football games. Specifically, the Fifth Circuit's decision erroneously concludes that a *Clear Creek*-type prayer policy

3. The Resolution at issue in *Clear Creek II* provided as follows:

> 1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
>
> 2. The invocation and benediction, if used, shall be given by a student volunteer; and,
>
> 3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

cannot exist "outside [the] nurturing context [of a graduation ceremony]." In reaching this conclusion, the Fifth Circuit failed to consider the unique context in which pre-game prayer occurs and whether the same type of considerations that justify prayer at graduation ceremonies may also be present in the context of high school football games. Additionally, the court below failed to analyze the Santa Fe "fall-back" football prayer policy under the three Establishment Clause tests enunciated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Lee v. Weisman*, 505 U.S. 577 (1992), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).[4]

ARGUMENT

I. High school football games are not inherently different in context and nature than high school graduation ceremonies.

The Fifth Circuit erroneously concluded, in summary fashion, that Santa Fe's "fall-back" policy does not pass constitutional muster because a football game is inherently different in context and nature from a graduation ceremony. In so holding, the court below failed to recognize the unique place that high school football occupies in the fabric of numerous communities across the country. In particular, the

4. Consistent with the *Clear Creek* Resolution, Santa Fe's so-called "fall-back" football policy provides for a student-initiated, student-led "brief invocation and/or message" of a nonsectarian and nonproselytizing nature "to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 812 (5th Cir. 1999).

Fifth Circuit overlooked the fact that, for many citizens, the "Friday night lights" of high school football are an "integral part of what [makes] the community strong." H.G. Bissinger, *Friday Night Lights: A Town, a Team, and a Dream*, p. 43 (1990).[5]

5. The role that high school football occupies in the "psyche" of many communities is chronicled in H.G. Bissinger's account of the 1988 season of the Odessa, Texas Permian Panthers in *Friday Night Lights* (1990).

> In the absence of a shimmering skyline, the Odessas of the country had all found something similar in which to place their faith. In Indiana, it was the plink-plink-plink of a ball on a parquet floor. In Ohio and Pennsylvania and Alabama and Georgia and Texas and dozens of other states, it was the weekly event simply known as Friday night. . . . From the twenties through the eighties, whatever else there hadn't been in Odessa, there had always been high school football.

Id. at 35.

> There were certain events in Odessa that had become time-honored traditions, essential elements in the biological clock of the town. There was the annual downtown Christmas tree-lighting ceremony sponsored by the banks. . . . There was the biennial Oil Show. . . . And, of course, in late August, there was the Permian [football] booster club's Watermelon Feed, when excitement and madness went quickly into high gear. . . . [T]he boys of Permian would come before the crowd one by one so they could be checked out and introduced. And after that, in less than two weeks, would come the glorious start of the season on the first Friday night in September.

Id. at 37-38.

Contrary to what the Fifth Circuit concluded, the "context" and "nature" of a high school football game are, in fact, very similar to that of a high school graduation ceremony in a number of important respects. First, a high school football game — like a graduation ceremony — can take on all of the trappings of a major community-wide social event, complete with the kind of attendance that is reserved for other special or "rite of passage" occurrences. Second, a high school football game affords student participants (*e.g.*, athletes, band members, cheerleaders, the pep squad) the opportunity for public recognition and support that would not otherwise be available to them. And, third, a high school football game, and all of the activity that surrounds the game, can serve as the very embodiment of a community's civic pride.

> [Football] is a game, an extracurricular activity, a community bond, the state religion, the biggest show in town every Friday night in the fall, a character builder, a revered symbol, an inspirational rallying point that offers a rare moment — more like 48 minutes — in which all races, religions, and economic strata put aside their differences to get behind the home team, a traffic generator for the local Dairy Queen, and topic A in coffee shops from Roscoe . . . to Itasca.

"Three Cheers for High School Football," *Texas Monthly Magazine*, p. 111, Oct. 1999.

Given the similarities between their context and nature, the Fifth Circuit clearly erred in holding that a *Clear Creek*-type policy cannot be extended from graduation ceremonies to high school football games. Indeed, in view of the

importance that high school football serves in the life of a community, "people should not be surprised to find the event affected by community standards." *Clear Creek II*, 977 F.2d at 972.

II. A policy permitting student-initiated, student-led, nonproselytizing, nonsectarian prayer at high school football games withstands constitutional scrutiny under this Court's Establishment Clause tests.

The Fifth Circuit failed to evaluate Santa Fe's "fall-back" policy under this Court's Establishment Clause tests, instead declaring in a conclusory fashion that football games are "hardly the sober type of event that can be appropriately solemnized with prayer." Had the Fifth Circuit undertaken such analysis, Santa Fe's "fall-back" policy would have been found to survive constitutional scrutiny under the tests announced by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Lee v. Weisman*, 505 U.S. 477 (1992), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

A. The *Lemon* Test.

Santa Fe's "fall-back" policy articulates three secular purposes for the inclusion of a pre-game prayer or invocation: (1) solemnization; (2) promotion of good sportsmanship and student safety; and, (3) establishment of the appropriate environment for the competition. Although the court below did not apply the *Lemon* test to Santa Fe's football policy specifically, the Fifth Circuit, nevertheless, questioned whether a football game is the type of event that can be solemnized with a prayer.

While, admittedly, a football game is not, in all things, the same "sober" event that a graduation ceremony is, the

Fifth Circuit's opinion discounts the importance of injecting a sobering influence into what is otherwise an emotional and often violent affair. Indeed, that is the very purpose of a pregame invocation: to cause all of those in attendance, spectators and participants alike, to pause in recognition of the need for civility in their endeavors.

Santa Fe's "fall-back" policy satisfies the effect and endorsement prongs of the *Lemon* test, as well. Unlike the prayer policies at issue in *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989), and *Doe v. Duncanville*, 70 F.3d 402 (5th Cir. 1995), the Santa Fe policy does not provide for inherently-religious invocations or prayers. The "fall-back" policy's requirements that a pre-game invocation be (1) "student initiated," (2) "student led," *and* (3) "nonsectarian and nonproselytizing" protect against the conveyance of any religious message that is either endorsed or disapproved of by the School District. *See Clear Creek II*, 977 F.2d at 967 (a policy "can only advance religion by increasing religious conviction . . . , which means attracting new believers or increasing the faith of the faithful").

B. *Lee's* "Coercion" Test.

In *Lee*, this Court defined unconstitutional coercion as (1) government direction (2) of a formal religious exercise (3) that obliges the participation of objectors. *See* 505 U.S. at 591-94. Employing this analysis, Santa Fe's "fall-back" policy does not implicate any of the elements of coercive effect. First, the District's policy does not serve to "direct" religious activity as defined by *Lee* because the District is not determining whether an invocation will occur; the District is not selecting a religious participant (*e.g.*, a rabbi or priest); and, the District does not direct the specific content of the prayer. *See id.*

Second, Santa Fe's "fall-back" policy does not implicate formal religious observance of any kind. To the contrary, like the Resolution at issue in *Clear Creek II*, the "fall-back" policy "tolerates nonsectarian, nonproselytizing prayer, but does not require or favor it." *See Clear Creek II*, 977 F.2d at 971.

Finally, Santa Fe's "fall-back" policy does not oblige participation. Those students who choose to attend a particular football game will not be subject to the psychological pressure that was placed on the middle school graduation attendees in *Lee* because the Santa Fe students "*after having participated in the decision of whether prayers will be given*, are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy." *See id.* at 971 (emphasis in original). Moreover, because the Santa Fe students who are affected by the football policy are of high school age (rather than middle school), they are "mature enough and are likely to understand" the difference between state sponsorship of religion and a peer's symbolic nonsectarian, nonproselytizing speech. *See Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (recognizing that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis").

C. The "Endorsement" Test.

Similar in nature to *Lemon's* "effect" prong, the endorsement test analyzes the effect of a challenged governmental action to determine whether "a reasonable person would view the challenged . . . action as a disapproval

of her contrary religious choices." *Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring).

Unlike the policy at issue in *Lee*, the Santa Fe "fall-back" policy does not mandate the delivery of a pre-game prayer or invocation; rather, the policy permits the inclusion of a nonsectarian, proselytizing "statement or invocation" in pre-game ceremonies, should the student body so determine by election. Moreover, the "fall-back" policy is passive in terms of government direction or involvement to the extent that the student body, rather than school officials, serves as the genesis of the invocation. After participating in an election to determine whether an invocation or statement will be included in pre-game ceremonies, the high-school aged students of Santa Fe who are affected by the District's football policy are not likely to "perceive any more government endorsement of religion . . . than do students in Westside Community schools who are regularly recruited during school hours to join a Christian club." *See Clear Creek II*, 977 F.2d at 969 (referring to *Mergens, supra*). Once again, the age of the students at issue and the voluntary, non-compulsory nature of the activity in which the pre-game prayer or invocation will be delivered also serve to diminish the likelihood that students will perceive an endorsement of religion or religious activity on the part of Santa Fe Independent School District.

III. A *Clear Creek*-type football policy balances the competing directives of the Free Exercise and the Establishment Clauses.

In the end, a *Clear Creek*-type football policy provides a reasonable means of balancing the complementary, yet competing, directives of the Free Exercise and Establishment

Clauses. On the one hand, a *Clear Creek*-type policy affords students an opportunity to engage in a form of religious — or nonreligious — expression during a community-wide sporting event, without direct government involvement or control. On the other hand, a *Clear Creek*-type policy serves to guard against the risk of concerted religious promotion by requiring that any pre-game invocation and/or message be nonsectarian and nonproselytizing in nature. At bottom, the simple precepts of a *Clear Creek*-type policy can be readily followed, for they strike not only a constitutional balance but a commonsensible one as well.

CONCLUSION

Public schools are continuously challenged to accommodate the interests of the communities that they serve while, at the same time, ensuring that the constitutional rights of all students are protected. As such, they must frequently strike a balance between competing constitutional concerns. In an effort to achieve such a balance in student religious expression at school-sponsored events, many have adopted a policy similar to Santa Fe's "fall-back" football prayer policy, believing it to be a logical extension of the graduation prayer policy endorsed by the Fifth Circuit in *Clear Creek II*. By its disapproval of the extension of *Clear Creek II*, the panel in *Doe v. Santa Fe* has deprived school districts of a legally sound, middle ground approach to a thorny societal and constitutional dilemma. *Amicus curiae* asks this Court to, at a minimum, reverse that portion of the opinion below in order to enable school districts to utilize this important balancing device.

Respectfully submitted,

DAVID M. FELDMAN
MYRA C. SCHEXNAYDER
Counsel of Record
FELDMAN & ROGERS, L.L.P.
Attorneys for Amicus Curiae
Coastal Banc Plaza
5718 Westheimer, Suite 1200
Houston, Texas 77057
(713) 960-6000

APPENDIX

APPENDIX

TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND PARTICIPATING SCHOOL DISTRICTS

Academy ISD, Agua Dulce ISD, Alamo Heights ISD, Alba-Golden ISD, Albany ISD, Aldine ISD, Aledo ISD, Alice ISD, Alief ISD, Allen ISD, Alpine ISD, Alto ISD, Alvarado ISD, Alvin ISD, Amarillo ISD, Anahuac ISD, Anderson-Shiro CISD, Angleton ISD, Anson ISD, Anthony ISD, Aquilla ISD, Aransas County ISD, Aransas Pass ISD, Argyle ISD, Arlington ISD, Aspermont ISD, Athens ISD, Atlanta ISD, Austin ISD, Austin ISD, Avery ISD, Axtell ISD, Baird ISD, Ballinger ISD, Balmorhea ISD, Bandera ISD, Bangs ISD, Banquete ISD, Bartlett ISD, Bastrop ISD, Bay City ISD, Bay City ISD, Beeville ISD, Bellevue ISD, Bellville ISD, Belton ISD, Ben Bolt-Palito Blanco ISD, Benavides ISD, Big Sandy ISD-Polk County, Big Sandy ISD-Upshur County, Birdville ISD, Bishop CISD, Blackwell CISD, Bland ISD, Blanket ISD, Bloomington ISD, Blum ISD, Boerne ISD, Boles ISD, Boling ISD, Booker ISD, Borden County ISD, Bosqueville ISD, Bovina ISD, Bowie ISD, Boys Ranch ISD, Brackett ISD, Brady ISD, Brazos ISD, Brazosport ISD, Breckenridge ISD, Bremond ISD, Brenham ISD, Bridge City ISD, Bridgeport ISD, Broaddus ISD, Brock ISD, Bronte ISD, Brookeland ISD, Brownsboro ISD, Brownwood ISD, Bruceville-Eddy ISD, Bryson ISD, Buffalo ISD, Bullard ISD, Buna ISD, Burkburnett ISD, Burkeville ISD, Burleson ISD, Burnet CISD, Burton ISD, Bushland ISD, Bynum ISD, Caddo Mills ISD, Calallen ISD, Caldwell ISD, Calhoun County ISD, Callisburg ISD, Callisburg ISD, Calvert ISD, Cameron ISD, Campbell ISD, Canadian ISD, Canutillo ISD, Canyon ISD, Carrizo Springs CISD, Carroll

ISD, Carrollton-Farmers Branch ISD, Carthage ISD, Castleberry ISD, Celeste ISD, Celina ISD, Center Point ISD, Centerville ISD-Leon County, Centerville ISD-Trinity County, Central ISD, Channelview ISD, Channing ISD, Chapel Hill ISD-Smith County, Cherokee ISD, Chico ISD, Childress ISD, Chilton ISD, Chireno ISD, Christoval ISD, City View ISD, Clarendon CISD, Claude ISD, Cleburne ISD, Clifton ISD, Clint ISD, Clyde CISD, Clyde CISD, Coahoma ISD, Coleman ISD, Collinsville ISD, Colorado ISD, Columbia-Brazoria ISD, Columbus ISD, Comal ISD, Comfort ISD, Como-Pickton CISD, Comstock ISD, Connally ISD, Conroe ISD, Coolidge ISD, Cooper ISD, Coppell ISD, Copperas Cove ISD, Corpus Christi ISD, Corrigan-Camden ISD, Corsicana ISD, Cotulla ISD, Crandall ISD, Crane ISD, Crockett County Consolidated CSD, Crosby ISD, Crosbyton ISD, Crosbyton ISD, Crowell ISD, Crystal City ISD, Cuero ISD, Cushing ISD, Cypress-Fairbanks ISD, Daingerfield-Lone Star ISD, Dalhart ISD, Dallas County Schools, Dallas ISD, Danbury ISD, Dawson ISD-Dawson County, Dawson ISD-Navarro County, Dayton ISD, De Leon ISD, Deer Park ISD, Del Valle ISD, Dell City ISD, Denton ISD, Denver City ISD, DeSoto ISD, Detroit ISD, Dew ISD, Deweyville ISD, Dickinson ISD, Dilley ISD, Dimmitt ISD, Divide ISD-Kerr County, Doss Consolidated CSD, Douglass ISD, Dripping Springs ISD, Dublin ISD, Dumas ISD, Eagle Mountain-Saginaw ISD, Eagle Pass ISD, Eanes ISD, Early ISD, East Central ISD, East Chambers ISD, Eastland ISD, Ector County ISD, Edcouch-Elsa ISD, Eden CISD, Edgewood ISD-Van Zandt County, Edinburg CISD, Edna ISD, El Campo ISD, Electra ISD, Elgin ISD, Elysian Fields ISD, Ennis ISD, Eula ISD, Eustace ISD, Everman ISD, Excelsior ISD, Fabens ISD, Fairfield ISD, Farmersville ISD,

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ISD, Rusk ISD, S and S CISD, Sabine ISD, Saint Jo ISD, Salado ISD, Sam Rayburn ISD, San Angelo ISD, San Antonio ISD, San Augustine ISD, San Benito CISD, San Diego ISD, San Elizario ISD, San Felipe-Del Rio CISD, San Marcos CISD, San Perlita ISD, San Saba ISD, San Vicente ISD, Sanford ISD, Santa Anna ISD, Santa Fe ISD, Santa Gertrudis ISD, Santa Maria ISD, Santo ISD, Savoy ISD, Schertz-Cibolo-Univ. Cty ISD, Schleicher County ISD, Seagraves ISD, Seguin ISD, Seminole ISD, Seymour ISD, Shamrock ISD, Sharyland ISD, Shelbyville ISD, Sheldon ISD, Shepherd ISD, Sherman ISD, Shiner ISD, Silsbee ISD, Silverton ISD, Sinton ISD, Skidmore-Tynan ISD, Slaton ISD, Slidell ISD, Slocum ISD, Smithville ISD, Socorro ISD, Somerville ISD, South San Antonio ISD, South Texas ISD, Southland ISD, Southside ISD, Southwest ISD, Spearman ISD, Splendora ISD, Spring Branch ISD, Spring Creek ISD, Spring Hill ISD, Spring ISD, Springlake-Earth ISD, Springtown ISD, Stafford Municipal School District, Stanton ISD, Star ISD, Stephenville ISD, Stockdale ISD, Stratford ISD, Strawn ISD, Sudan ISD, Sulphur Bluff ISD, Sulphur Springs ISD, Sundown ISD, Sunnyvale ISD, Sunray ISD, Sweeny ISD, Sweetwater ISD, Tarkington ISD, Tatum ISD, Taylor ISD, Temple ISD, Tenaha ISD, Terlingua CSD, Terrell County ISD, Terrell ISD-Kaufman County, Texarkana ISD, Thorndale ISD, Three Rivers ISD, Three Way ISD-Bailey County, Throckmorton ISD, Timpson ISD, Tioga ISD, Tolar ISD, Tom Bean ISD, Tomball ISD, Tornillo ISD, Trent ISD, Trenton ISD, Trinidad ISD, Trinity ISD, Troup ISD, Tulia ISD, Tuloso-Midway ISD, Turkey-Quitaque ISD, Tyler ISD, United ISD, Utopia ISD, Uvalde CISD, Valentine ISD, Valley Mills ISD, Valley View ISD-Hidalgo County, Van ISD, Van Vleck ISD, Venus ISD,

Veribest ISD, Vernon ISD, Victoria ISD, Vidor ISD, Vysehrad ISD, Waelder ISD, Wall ISD, Waller ISD, Warren ISD, Waskom ISD, Waxahachie ISD, Weatherford ISD, Webb CISD, Weimar ISD, Weslaco ISD, West Hardin County CISD, West ISD, West Orange-Cove CISD, West Sabine ISD, Westbrook ISD, Westhoff ISD, Wharton ISD, White Deer ISD, White Oak ISD, White Settlement ISD, Whiteface CISD, Whitehouse ISD, Whitharral ISD, Whitney ISD, Wichita Falls ISD, Willis ISD, Wills Point ISD, Wilmer-Hutchins ISD, Wimberley ISD, Windthorst ISD, Wink-Loving ISD, Winnsboro ISD, Winona ISD, Winters ISD, Woden ISD, Woodsboro ISD, Woodson ISD, Wortham ISD, Wylie ISD-Collin County, Yantis ISD, Ysleta ISD, Zapata County ISD, Zavalla ISD, Zephyr ISD

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IN THE

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

JANE DOE, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF LIBERTY COUNSEL AND LIBERTY ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Jerry Falwell, Jr.
Va. Bar No. 27396
LIBERTY ALLIANCE
P.O. Box 542
Forest, VA 24551

Mathew D. Staver
(Counsel of Record)
Florida Bar No. 0701092
Erik W. Stanley
Florida Bar No. 0183504
LIBERTY COUNSEL
1900 Summit Tower Blvd.
Suite 540
Orlando, Florida 32810
(407) 875-2100

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INTEREST OF *AMICI*

Liberty Counsel

Liberty Counsel is a non-profit civil liberties education and legal defense organization.[1] Liberty Counsel provides education and legal representation regarding the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment to the United States Constitution. Attorney Mathew D. Staver and Liberty Counsel have been actively engaged in defending the rights of students' free speech within public schools. In 1993, Liberty Counsel intervened on behalf of a number of public school students to become co-defendants in which Liberty Counsel has defended the constitutionality of a graduation message policy. The policy at issue in Jacksonville, Duval County, Florida, states as follows:

> 1. The use of a brief opening and/or closing message not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating class;
>
> 2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
>
> 3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or

---

[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent are on file with this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

> otherwise reviewed by Duval County School Board, its officers or employees;
>
> The purpose of these guidelines is to allow students to direct their own graduation message without monitoring or review by school officials.

Adler v. Duval County Sch. Bd., 851 F. Supp. 466 (M.D. Fla. 1994), *aff'd in part, vacated in part, and remanded in part*, 112 F.3d 1475 (11th Cir. 1997).

The above-cited *Adler* case was first argued before the Eleventh Circuit Court of Appeals in 1995 and then again in 1996. In 1997 the Eleventh Circuit vacated the case in part because the plaintiffs had graduated. In May of 1998, Emily Adler, the sister of the original plaintiff, Karen Adler, brought a second suit against the Jacksonville, Duval County, School Board challenging the same policy. Again, Liberty Counsel intervened on behalf of a new set of students to become co-defendants defending the constitutionality of the message policy. In *Adler v. Duval County Sch. Bd.*, No. 98-460-CIV-J-10C (M.D. Fla. May 27, 1998), the same federal district judge as in the original *Adler* case again upheld the constitutionality of the policy against an Establishment Clause challenge. The District Court also ruled that the graduation policy created a limited public forum for student messages and to censor the religious content of said messages would violate the Free Speech Clause. In August of 1999, the case was again argued before the Eleventh Circuit Court of Appeals. On May 11, 1999, the Eleventh Circuit, in a 2-1 decision, found the policy unconstitutional, in part because the Court ruled that students became state actors whenever they entered the graduation podium. Liberty Counsel on behalf of the student-intervenors filed a Motion for Rehearing *en banc* which was granted on June 3, 1999, thus vacating the decision and setting the case for *en banc* oral argument. *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999). Counsel of record then argued this case before a panel of twelve judges at the Eleventh Circuit Court of Appeals on October 19, 1999. A decision on the matter is pending.

Liberty Alliance

The Liberty Alliance is a non-profit education and lobbying organization founded in 1986. The Liberty Alliance's activities include educating the public and influencing public policy regarding the role of government in preserving and implementing religious freedoms and traditional family values in the United States of America.

As part of advancing its purpose, Liberty Alliance provides educational resources to the general public, coordinates petition drives to express the opinions of citizens to lawmakers, coordinates regional educational seminars for religious and lay community leaders, and publishes articles and produces videos for distribution to the public.

Liberty Alliance is participating with Liberty Counsel in the filing of this brief because it is particularly interested in protecting the constitutional rights of public school students to speak at high school sporting events. Attorney Jerry L. Falwell, Jr. is General Counsel to The Liberty Alliance.

SUMMARY OF ARGUMENT

The Guidelines allow the students to decide whether to have a message and/or an invocation at varsity football games. As such, the Guidelines have created a limited public forum for student speech. Within this forum the student volunteer can present a secular or religious message at his or her discretion. The school remains aloof and uninvolved. Since the school has allowed the student speakers to select their own topics, including controversial subject matters, then the school has clearly created a limited public forum for student speech. Speakers can be excluded from this limited public forum only when the exclusion is necessary to serve a compelling interest.

Respondents seek an injunction requiring the school to censor student speech based solely on its content. Censorship of student

speech for religious content is unconstitutional in a limited public forum. Moreover, if the school did not create a limited public forum for student speech, an injunction censoring student religious speech would result in viewpoint censorship even in a nonpublic forum. Under the Guidelines the students can speak on any topic. However, an injunction censoring religious speech would allow the students to speak on any topic except from a religious viewpoint. Viewpoint censorship even in a nonpublic forum is unconstitutional.

The Guidelines do not violate the Establishment Clause. The Guidelines have a secular purpose of calling to order the beginning of the varsity sporting event. Since the Guidelines allow secular and religious speech, the Guidelines have a secular purpose. Moreover, the Guidelines do not have the primary effect of advancing religion. Since the content of the message is left up to the individual student, the school does not have any idea what message will be presented. The message can be secular, sacred, profane or profound. The school remains aloof and uninvolved. The school does not mandate the content of the message.

Requiring the school to censor student messages by editing out religious content would violate the Establishment Clause by showing hostility toward religion and by creating excessive entanglement with religion. The school would have to make doctrinal choices between what is and is not religious.

The Guidelines provide no coercion with regards to religious speech. The school does not select the speaker, the content of the speech, and does not give any guidelines on how to say a religious message. Clearly private religious speech has very little potential for coercion, and in the context where the school remains aloof from the content of the message, there can be no governmental coercion.

ARGUMENT

I.

CENSORING STUDENT-INITIATED, STUDENT-LED SPEECH AT HIGH SCHOOL SPORTING EVENTS VIOLATES THE FREE SPEECH CLAUSE.

Students on public school campuses retain their rights as private citizens when they enter school property. One of these rights is the right to freedom of speech. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

Addressing graduation prayer, this Court recognized the following at the conclusion of the majority opinion:

> A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. . . . We recognize that, *at graduation time* and throughout the course of the educational process, ***there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.***

Lee v. Weisman, 505 U.S. 577, 598-599 (1992)(emphasis added).

Clearly the case before this Court represents one of those instances envisioned by this Court in *Lee*. The Guidelines clearly create a limited public forum for student expressive activity. Within this limited public forum, students are able to express whatever view they desire without school oversight, supervision, or editorialism. Even in the absence of a limited public forum for student expression, the Respondents' requested injunction, which requires school intervention in the form of censorship, would nevertheless violate the First Amendment based upon viewpoint-based discrimination.

A.

Content Censorship of Student-Initiated And Student-Led Religious Speech In A Limited Public Forum Is Unconstitutional.

The Guidelines clearly create a limited public forum for student expression during graduation ceremonies. The Guidelines state in pertinent part as follows:

> The Board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition . . . . The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

"To ascertain what limits, if any, may be placed on protected speech, [the Supreme Court has] often focused on the place of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). *See also Heffron v. ISKCON*, 452 U.S. 640 (1981); *United States v. Kokinda*, 497 U.S. 720 (1990). "A public forum may be created for a limited purpose such as use by certain groups." *Perry Educational Assoc. v. Perry Local Educator's Assoc.*, 460 U.S. 37, 49 n.9 (1983). A designated or limited public forum is "created when the government opens property to the public for expressive activity." *Id.* "A limited public forum is a forum for certain groups of speakers or for the discussion of certain subjects." *Id.* at 591; *see also Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n.*, 429 U.S. 167 (1976).

In determining whether property has been designated a limited public forum there are several relevant factors. *See Cornelius v.*

NAACP Legal Defense and Ed. Fund, Inc., 473 U.S. 788, 803 (1985). The first factor is governmental intent. "The nature of the property and its compatibility with expressive activity provide additional bearing on intent." *Id.* at 802. However,

> the forum inquiry does not end with the government's statement of intent. To allow... the government's statement of intent to end rather than to begin the inquiry into the character of the forum would effectively eviscerate the public forum doctrine; the scope of the first amendment rights would be determined by the government rather than by the Constitution... Forum classification should be triggered by what a school does, not what it says.

Gregoire v. Centennial School Dist., 907 F.2d 1366 (3rd Cir. 1990) (*quoting Bd. of Edu. of Westside Community v. Mergens*, 496 U.S. 226 (1990)). "The determination of whether the government has designated a public forum is based upon two factors: governmental intent and the extent of use granted." *Brody v. Spang*, 957 F.2d 1108, 1117 (3rd Cir. 1992)(*citing Gregoire*, 907 F.2d at 1371). Courts have recognized that a limited public forum may be created during a graduation ceremony.

> ***If, for example, school officials have authorized students to choose which of them will speak, and have permitted those speakers to select their own topics, including controversial subject matters, then officials may have created a limited public forum.*** Not only would such a practice demonstrate an intent to foster public discourse, but it would avoid attaching the imprimatur of the school to the views expressed in the student's speeches.

Brody, 957 F.2d at 1120 (emphasis added); *see also Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989)(recognizing that a school can create a public forum during the graduation ceremony).

The Guidelines create a limited public forum during high school sporting events. The Guidelines do not prescribe the content of speech. The students have full and unbridled discretion as to whether a message will be included at the event, and, if included, its content. A student wishing to engage in sectarian or non-sectarian speech can do so without interference or promotion by the school. Because the Guidelines allow any student speech on any topic, they have created a limited public forum.

It would be completely out of character with the public forum doctrine for the school to allow unbridled discretion for a student to speak on any topic and yet to hold that such a grant of unbridled discretion does not evince an intent by the school to create a public forum. Indeed, it is exactly this type of intent that creates a public forum. The state is uninvolved and aloof. The School neither approves or disapproves of the content of the speech to be given by the student. As a matter of fact, the school has no idea what the student may or may not say. Under the Guidelines, it would be just as permissible for a student to say absolutely nothing, or to give a purely secular speech, as it would for the student to say something religious.

Because the Guidelines create a limited public forum, any content-based restrictions on speech in that forum must pass strict scrutiny. Speakers can be excluded from a limited public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. *See Perry Education Ass'n*, 460 U.S. at 45-46; *United States v. Kokinda*, 497 U.S. 720, 726-27 (1990). This Court has stated:

> In these quintessential public fora, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end... The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government

> interest, and leave open ample alternative channels of communication.

Frisby v. Schultz, 487 U.S. 474, 479 (1988)(*quoting Perry Education Ass'n.*, 460 U.S. at 49). Exclusion of speech which might be subjectively viewed as "religious" is a content-based restriction that cannot be countenanced under the First Amendment. Such a content-based restriction runs counter to the idea that "schools are peculiarly the marketplace of ideas." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Rivera v. Board of Regents*, 721 F. Supp. 1189 (D. Colo. 1989); *Thompson v. Waynesboro Area School District*, 673 F. Supp. 1376 (N.D. Pa. 1987). Such content-based regulations cannot be tolerated. *See Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992). Stressing its disdain for content-based prohibitions, this Court stated:

> But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content. [citations omitted]... The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principles that debate on public issues should be uninhibited, robust and wide open."

New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1963)(*quoting Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972)). Content-based regulations of speech constitute "censorship in a most odious form." *Cox v. Louisiana*, 379 U.S. 536, 581 (1965)(Black, J. concurring). Granting an injunction to Respondents would only censor the "religious" content of student speech.

The Eleventh Circuit Court recognized that "the Free Speech and Free Exercise Clauses of the First Amendment require the State to tolerate genuinely student-initiated religious speech in schools." *Chandler v. James*, 180 F.3d 1254, 1258 (11th Cir. 1999). "It is

true that ordinarily religious speech by private persons cannot establish religion, even if it occurs in a public institution, such as a school." *Id.* at 1258 (*citing Mergens*, 496 U.S. at 250). The same Court also acknowledged the following:

> Permitting students to speak religiously signifies neither State approval nor disapproval of that speech. The speech is not the State's -- either by attribution or adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.

Chandler, 180 F.3d at 1261. "Because genuinely student-initiated religious speech is private speech endorsing religion, it is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution." *Id.*

In the present case, Respondents request this Court to condone an injunction in the context of a limited public forum that would result in a content-based restriction on speech some bureaucratic censor might deem religious. Such a content-based restriction may not be countenanced by arguing that the students are governmental actors. In *Bethel School District v. Fraser*, 478 U.S. 675 (1986), this Court recognized the distinction between school-sponsored speech and the private expression of students. "It is clear that the mere fact that student speech takes place on school property does not transform it into government speech." *Id.* at 681. In this case, the students are not government actors, are not acting in concert with the school, and do not seek government support or endorsement of speech. "Religious speech by students does not become forbidden 'state action' the moment the students walk through the schoolhouse door." *Chandler*, 180 F.3d at 1261-62. Indeed, "students are not state actors and, therefore, by definition, their actions cannot tend to 'establish' religion in violation of the Establishment Clause." *Id.* at 1258. Numerous other cases suggest that a student's expression is personal if it is voluntary and not dictated by any individual group. *See Mergens*, 495 U.S. at 226. "There is a crucial difference between government speech endorsing

religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 248. "A student's individual decision to pray or otherwise speak religiously is not the state's command. Such speech is fully protected." *Chandler*, 180 F.3d at 1264 (citations omitted).

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and appearance." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994). This Court has made clear that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 760 (1995). This Court has noted that when the State does not sponsor the private speech, when the expression is made on government property that has been opened as a forum for speech, and when permission is requested through the same application process and on the same terms required as other speakers, then the Establishment Clause is not implicated when religious speech is presented. *Id.* at 762. "It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of *government*. It was never meant, and has never been read by this Court to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum." *Id.* at 766. "Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Id.* at 769.

B.

Viewpoint Censorship of Student-Initiated And Student-Led Religious Speech In A Non-Public Forum Is Unconstitutional.

Clearly the Guidelines have created a limited public

forum for student expressive activity during graduation ceremonies. Within this limited public forum, the students are free to speak on any topic, secular or sacred, profane or profound. However, even if the Guidelines do not create a limited public forum for student expressive activity, the Respondents' request for Injunctive Relief is nevertheless unconstitutional because even in a non-public forum, viewpoint-based discrimination is impermissible. Control over access to a non-public forum can be based on subject matter and speaker identity as long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral. *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). This Court has stated the following:

> Although a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum ... or if he is not a member of the class of speakers for whose especial benefit the forum was created ..., ***the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.***

Id. at 806 (emphasis added).

In *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), this Court invalidated a school policy which excluded use of the facilities for religious purposes. This Court ruled that the church's film series dealt with an otherwise includable subject. The film was denied solely because of its religious viewpoint. "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor

some viewpoints or ideas at the expense of others.'" *Id.* at 394 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). This Court also ruled that there was no Establishment Clause interest at stake, because when property is used for religious purposes under an open access policy, the Establishment Clause is not implicated. *See Lamb's Chapel*, 508 U.S. at 394-395 (*citing Widmar*, 454 U.S. at 271).

The policy in *Lamb's Chapel* stated that the premises "shall not be used by any group for religious purposes". *Lamb's Chapel*, 508 U.S. at 387. This Court did not decide whether the property was a limited public forum, but instead decided the case on the narrow issue of viewpoint discrimination, which is impermissible even in a non-public forum. *Id.* at 393.

Since the film series dealt with an otherwise includable or permissible topic, the Court found that the school unconstitutionally engaged in viewpoint discrimination by prohibiting a religious viewpoint on a permissible topic. "The principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Id.* at 394 (*quoting Taxpayers for Vincent*, 466 U.S. at 804). "To discriminate 'against a particular point of view ... would ... flunk the test ... [of] *Cornelius* provided that the defendants have no defense based on the Establishment Clause.'" *Id.* (*quoting May v. Evansville-Vanderburgh Sch. Corp.*, 787 F. 2d 1105, 1114 (7th Cir. 1986)).

Lamb's Chapel then referred to its previous decision in *Widmar*, 454 U.S. at 263, thereby rejecting any Establishment Clause argument since the property also was used for secular purposes. *Lamb's Chapel*, 508 U.S. at 394-395.

In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the University of Virginia used student activity fees to fund a wide range of student newspapers but refused to fund a Christian student newspaper. This Court ruled against the University because it found that the school engaged in viewpoint discrimination.

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional. These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. When the government targets not the subject matter, but particular views taken by speakers on the subject, the violation of the First Amendment is all the more blatant. ***Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.***

Id. at 828-29 (emphasis added)(citations omitted).

Viewpoint discrimination is "presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 830. This Court rejected the University's argument that it did not engage in viewpoint discrimination because the guidelines discriminated against an entire class of

viewpoints. This Court noted:

> If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.

Id. at 831. "The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Id.* at 835. This Court rejected the University's Establishment Clause defense as follows:

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion. . . . We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and even-handed policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. . . . **More than once *we have rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.***

Id. at 839 (emphasis added)(citations omitted).

This Court concluded: "It does not violate the Establishment Clause for a public university to grant access to

its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises." *Id.* at 842.

An injunction in this case would necessarily be viewpoint-based. Respondents do not seek the suppression of all speech -- only speech of a supposed "religious" content. An injunction restraining "religious" content necessarily asks, "what is religious?" It is beyond dispute that Americans live in a religiously pluralistic society. Therefore, what may not be religious to one individual may be religious to another. Indeed, many religions refer to God differently. For the Islamic, God is "Allah", while for the Buddhist, God is "Buddha." Those of the animist religion believe God resides in certain animals while those of the New Age persuasion believe God resides in and around us like a "force." Secular Humanism, which the Supreme Court has defined as a religion, *see Torcaso v. Watkins*, 367 U.S. 488, 495 n.3 (1961), believes that man is God. Courts have recognized this plurality of religion. *See O'Hair v. Andrus*, 613 F.2d 931, 935 n.19 (D.C. Cir. 1979). It is clear that granting an injunction proscribing "religious" speech would necessarily fail for want of a clear definition of the content. Is, "May the Force be with you," religious? This type of viewpoint-based restriction would be unduly broad in its scope. In this case the student speech is "not required. Not commanded. Not even suggested. Simply permitted." *Chandler*, 180 F.3d at 1264. As the Eleventh Circuit Court noted: "The first principle must always be that genuinely student-initiated religious speech must be permitted. A student's individual decision to pray or otherwise speak religiously is not the State's command. Such speech is fully protected." *Id.* (citation omitted).

Since "religious speech is protected speech, government may not censor its content. . . . Suppression of religious speech constitutes viewpoint discrimination, the most egregious form of content-based censorship. . . . Government may not, therefore, censor religion from the content of students' protected speech at school." *Id.* at 1265 (citations omitted). "So long as school personnel do not participate in or actively supervise student-initiated speech, [the School Board] cannot constitutionally prohibit students from speaking religiously and [a] permanent injunction cannot require it to." *Id.* Clearly the student speech at issue in this case is student-initiated without any oversight by the School Board. Student speech is constitutionally protected even in a nonpublic forum. An injunction requiring censorship of a religious viewpoint is clearly unconstitutional, even in a non-public forum.

II.

THE GUIDELINES ALLOWING A STUDENT MESSAGE OR INVOCATION DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A.

The Guidelines Do Not Violate *Lemon v. Kurtzman*.

The *Lemon* test states that a government regulation must have a secular purpose, its principal or primary effect must not be to advance or inhibit religion, and it must not foster excessive entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). This Court has also stated that government coerces religious belief when the government directs a formal religious exercise by mandating prayer, choosing a clergy for the sole purpose of prayer, and

providing guidelines on how to deliver a non-sectarian, non-proselytizing prayer. The Guidelines do not violate either the *Lemon* or *Lee* tests. *See Lee v. Weisman*, 505 U.S. 577 (1992).

1. The Purpose Of The Guidelines Is Secular.

The Guidelines have a secular purpose and are neutral toward all student speech. An open forum policy promoting non-discrimination constitutes a valid secular purpose. *See Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1388-1389 (11th Cir. 1992)(en banc); *See also Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Sherman v. Community Consolidated School District 21*, 8 F.3d 1160 (7th Cir. 1993)(even-handed treatment of religious and non-religious groups makes the school district's policy indistinguishable from situations presented to the Supreme Court in both *Mergens* and *Lamb's Chapel*); *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992)(en banc). The Establishment Clause is not implicated by treating all speech equally. In fact, "if the [Guidelines] were to differentiate and were to give preference to non-religious groups, this would raise an Establishment Clause concern." *Sherman*, 8 F.3d at 1165.

In *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), the Eleventh Circuit Court discussed whether a school is allowed to "permit" students to speak on religious subjects during a graduation ceremony. *Id.* at 1258. In analyzing whether "permitting" students to speak was permissible under the Constitution, the Eleventh Circuit stated, "Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's - either by attribution or by adoption. The permission signifies nothing more than that the State acknowledges its

constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved." *Id.* at 1261. "Religious speech by students does not become forbidden "state action" the moment the students walk through the schoolhouse door." *Id.* at 1261-62.

This first prong of the *Lemon* test "aims at preventing the relevant decision maker from abandoning neutrality and acting with intent of promoting a particular point of view in religious matters." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

In *Doe v. Madison School District No. 321*, 147 F.3d 832 (9th Cir. 1998) *vacated as moot Doe v. Madison School District No. 321*, 177 F.3d 789 (9th Cir. 1999), the Ninth Circuit affirmed a decision which found that a graduation policy "was motivated, at least in part, by a number of secular purposes, including a desire to grant top students the autonomy to deliver an uncensored speech... unwilling to trivialize the importance of bestowing responsibility on young adults." *Doe*, 147 F.3d at 837. Like this case, in *Doe* the policy simply allowed a student wishing to engage in sectarian or non-sectarian speech to do so without interference or promotion by the school.

> We conclude that the District's graduation policy survives the *Lemon* test. On its face, the policy has a secular purpose, its primary effect is not the advancement of religion, and it does not excessively entangle church and state... The significant control exerted by the school on the religious contents of the graduation program is missing. Indeed, it is the absence of this control which saves the graduation policy at issue from facial constitutional invalidation.

Doe, 147 F.3d at 838. A "policy of treating religious speech the same as all other speech certainly serves a secular purpose." *Americans United for Separation of Church and State v. City of Grand Rapids*, 908 F.2d 1538 (6th Cir. 1992)(en banc).

2. *The Guidelines Do Not Have The Primary Effect Of Advancing Religion.*

In applying the second prong of the *Lemon* analysis, courts must "determine whether the [regulation]... would create the effect of endorsing or approving religious beliefs." *Chabad*, 5 F.3d at 1389. The Guidelines evince nothing more than accommodation of the student's right to exercise their constitutional right to free speech. The school does not pre-review or pre-screen the content of the message. The school has no idea what the student will say before the student gets up and delivers his or her message. The Guidelines allow the school to show neutrality toward all speech, secular and religious.

Granting an injunction would violate the Establishment Clause. An injunction would require the government to abandon its neutral stance toward religion and become the final arbiter of what may be considered religious and what is not. Such a position would inevitably lead to hostility towards religion rather than a position of neutrality as mandated by the First Amendment. An injunction would place the government in the position of requiring the students to "speak only the religious thoughts that government want[s] [them] to speak and to pray only to the God the government want[s] [them] to pray to." *Chandler*, 180 F.3d at 1260 (*quoting Engel v. Vitale*, 370 U.S. 421, 435 (1962)). The Court in *Engel* summarized its holding by stating:

> It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

Engel, 370 U.S. at 435 (emphasis added). Thus, the only way the government may avoid an Establishment Clause challenge is to maintain a position of neutrality, and not hostility towards religion.

The Guidelines "do not confer any imprimatur of state approval on religious sects or practices." *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). Most importantly, "the failure to censor is not synonymous with endorsement." *Chabad*, 5 F.3d at 1392 (*citing Mergens*, 496 U.S. 226, 245). "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 248. "The speech that takes place in a public forum belongs and can be attributed to the private speaker only; neither approbation nor condemnation of the private speaker's message may be imputed to the state." *Chabad*, 5 F.3d at 1392. "Any perceived endorsement of religion [here] is simply misperception; the Establishment Clause is not, in fact, violated." *Id.* at 1393 (*citing Doe*, 964 F.2d at 629).

"Even if permitting student-initiated religious speech advances religion in some sense, this does not mean the speech violates the Establishment Clause." *Chandler*, 180 F.3d at 1261. "This Court has recognized that 'our precedents plainly contemplate that on occasion some advancement of religion will result from governmental

action'... 'Not every law that confers an 'indirect' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid.'" *Id.* at 1262 (*quoting Lynch v. Donnelly*, 465 U.S. 668, 683 (1984); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)).

It is clear that the Guidelines in this case do not primarily advance religion. It also cannot be said that the government has delegated to the students what it may not do itself. It is true that the government may not delegate to a private citizen that which it may not do itself. *See Evans v. Newton*, 382 U.S. 296 (1966). "Student religious speech must be without oversight, without supervision, subject only to the same reasonable time, place, and manner restrictions as all other student speech in school." *Chandler*, 180 F.3d at 1264-1265. In discussing what supervised speech means, the *Chandler* Court stated:

> Supervision cannot mean, therefore, mere presence. Support for this view is found in *Mergens* in which the Supreme Court found no constitutional infirmity with the provision of the EAA which permits school employees to be present for custodial purposes at religious meetings held on school property . . . ***[F]or supervision to amount to unconstitutional endorsement, it must cross the line into active endorsement, encouragement or participation.***

Id. at 1265 n.19 (emphasis added)(citations omitted). "So long as school personnel do not participate in or actively supervise student-initiated speech, [the School Board] cannot constitutionally prohibit students from speaking religiously and the permanent injunction cannot require it to." *Id.* at 1265. In this case, the school officials have no control over the content

of what the student will say, or whether a student will say anything at all. The school does not even have control over who will give the student message. The Guidelines do not mandate prayer or any other speech for that matter, and thus, there is no government delegation in this case. The school does not delegate or supervise the speech of the students.

This Court has stated, "our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984). "Student-initiated speech, therefore, even if it incidentally advances religion does not violate the Establishment Clause because it is private speech endorsing religion which the First Amendment protects." *Chandler*, 180 F.3d at 1263 (*quoting Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 965 (5th Cir. 1992).

Indeed, to require the government to remove any vestiges of religion from public life would violate the Establishment Clause.

> The prohibition of all religious speech in our public school simples, therefore, an unconstitutional disapproval of religion. If endorsement is unconstitutional because it "sends a message to nonadherents that they are outsiders," disapproval is unconstitutional because it "sends the opposite message." ... "Cleansing" our public schools of all religious expression, however, inevitably results in the "establishment" of disbelief - atheism - as the State's religion. Since the constitution requires neutrality, it cannot be the case that government may prefer disbelief over religion.

Chandler, 180 F.3d at 1261. Furthermore, "The Constitution

does not require a complete separation of church and state such that religious expression may not be tolerated in our public institutions. In fact, 'it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.'" *Id.* at 1262 (*quoting Lynch*, 465 U.S. at 673). Indeed,

> untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Id. at 1261 (*quoting School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963)(Goldberg, J., concurring). The Eleventh Circuit has correctly recognized that:

> ***The discriminatory suppression of student-initiated religious speech demonstrates not neutrality but hostility towards religion*** because the "exclusion of religious ideas, symbols, and voices marginalizes religion... Silence about a subject conveys a powerful message. When the public sphere is open to ideas and symbols representing nonreligious viewpoints, culture, and ideological commitment, to exclude all those whose basis is "religious" would profoundly distort public culture.

Chandler, 180 F.3d at 1261 (emphasis added)(*quoting* McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI.

L. REV. 115, 189 (Winter 1992)). In this case, an injunction requiring the government to censor out religious messages from student speech sends a message of hostility forbidden by the Establishment Clause.

3. The Guidelines Do Not Excessively Entangle The Government With Religion.

The Guidelines do not result in excessive entanglement of government with religion. In this case, government involvement is non-existent. The government has no control over who will give the message or what will be said. The school officials do not supervise any aspect of the student message. A neutral policy granting students the right to free speech does not coerce religious conformance nor create excessive entanglement because it "precludes the state from making religion-based inquiries." *Chabad*, 5 F.3d at 1389.

The Guidelines insulate "the government from the necessity of scrutinizing the content" of the student speech. *Id.* The Guidelines "avoid the need for the state to make religion-based exclusionary judgments." *Id.* The Guidelines forbid entanglement by stating ***the content of the message shall be prepared by the student volunteer***. This Court has stated that the government would run a greater risk of excessive entanglement by monitoring and censoring religious speech. *See Widmar*, 454 U.S. at 263. The Guidelines remove government entanglement by precluding school officials from "making religious-based inquiries - such as, for example, determining what constitutes religious speech." *Chabad*, 5 F.3d at 1389. If school officials censored religious speech, they would certainly create excessive "entanglement by excluding certain speech on the ground that it is religious." *Chabad*, 5 F.3d at 1389. This Court has stated:

> We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech". Initially, the University would need to determine which words and activities fall within "religious worship an religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion."

Widmar, 454 U.S. at 272 n.11. Indeed, this Court has recognized that "[i]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." *O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979). An anti-religious censorship pen will lead to excessive entanglement of government with religion.

It is certainly unconstitutional to distinguish between various forms of religious speech and non-religious speech.

> Merely to draw the distinction would require the University -- and ultimately the courts -- to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in the manner forbidden by our cases.

Widmar, 454 U.S. at 269 n.6 (citations omitted).

As Justice Souter has remarked, it is hard to "imagine a subject less amenable for the competence of the Federal Judiciary, or more deliberately to be avoided where possible" than determinations about the religious content of speech.

Lee, 505 U.S. 616-17 (Souter, J. concurring). *See also Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987)(It is a significant burden to require a religious person or organization "to predict which of its activities a secular court will consider religious"). The Guidelines do not excessively tangle government with religion. An injunction requiring the School Board to appoint a bureaucratic censor whose job is to strike through any word deemed religious in a student's speech would create a tangled web between church and state.

B.

The Guidelines Do Not Violate *Lee v. Weisman*.

Under the facts of *Lee*, this Court found coercion because the school (1) decided that prayer *should* be given, (2) selected a religious speaker to give the prayer, and (3) gave the religious speaker guidelines on how to give a non-sectarian, non-proselytizing prayer. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992). In *Lee*, the "degree of school involvement" made it clear that the graduation prayers bore the imprint of the state. *Id.* at 590. This Court limited *Lee* to its specific facts. *Id.* at 599. The key to the Court's holding in *Lee* was the fact that it was the ***school*** which coerced the students to participate in a religious exercise. In this case, the Guidelines expressly prohibit involvement from the school in the entire process of selecting the student to deliver the message and in what that student will say. It is impossible under these Guidelines to find that the ***state*** is coercing a religious exercise. This state involvement in *Lee* is simply not present in the case at bar. The government is in no way mandating prayer, or telling the students how to pray, or that they must pray at all. The government is simply allowing the students to exercise their right to free speech. "Of course, in

this case we do not have state action. ***Private religious speech has even less potential for coercion***." *Chandler*, 180 F.3d at 1263 n.13. In *Lee*, Justice Souter stated:

> If the state had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the state. But that is not our case.

Lee, 505 U.S. at 630 n.8 (Souter, J., concurring).

> ***The "indirect coercion" identified in Lee by the plurality opinion*** was exerted over the audience by the State's command that there be a religious speech at graduation. Justice Kennedy's concern that "in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce," ***does not apply to the case of student-initiated religious speech***.

Chandler, 180 F.3d at 1263 n.16 (emphasis added)(citations omitted). Indeed, in the case of student-initiated religious speech, the fact that we live in a religiously pluralistic society demands respect for others' private religious speech. As Justice Scalia noted in *Lee*:

> We indeed live in a vulgar age. But surely "our social conventions" have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence... I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic

> virtue that government (including the public schools) can and should cultivate.

Lee, 505 U.S. at 637-638 (Scalia, J., dissenting).

There is simply no coercion present in the Guidelines because the only thing the Guidelines accomplish is to allow private student-initiated speech. Such speech cannot constitute governmental coercion of religious belief. The Guidelines present a different set of facts than *Lee*, and do not result in governmental coercion of religious belief.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

Jerry Falwell, Jr.
Va. Bar No. 27396
LIBERTY ALLIANCE
P.O. Box 542
Forest, VA 24551

Mathew D. Staver
(Counsel of Record)
Florida Bar No. 0701092
Erik W. Stanley
Florida Bar No. 0183504
LIBERTY COUNSEL
1900 Summit Tower Blvd.
Suite 560
Orlando, Florida 32810
(407) 875-2100

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IN THE

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

vs.

JANE DOE, individually and as next friend for her minor children Jane and John Doe, Minor Children; JANE DOE #2, individually and as next friend for her minor child, John Doe, Minor Child; and JOHN DOE, individually,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NORTHSTAR LEGAL CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JORDAN W. LORENCE
NORTHSTAR LEGAL CENTER
P.O. Box 2074
Fairfax, VA 22031
(703) 359-8619
Counsel for Record

19 pp

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INTEREST OF AMICUS[1]

Northstar Legal Center is a public interest legal organization located in Fairfax, Virginia that litigates cases involving constitutional law nationally. The Northstar Legal Center recently appeared before this Court representing the respondents in *Board of Regents of the University of Wisconsin v. Southworth*, No. 98-1189 (oral arguments November 9, 1999). The Northstar Legal Center has litigated a number of public forum - equal access cases in which government has excluded private speakers from a forum because of the religious content of the speakers' speech. The Northstar Legal Center supports the policy of the Santa Fe Independent School District which protects religious speech from discriminatory exclusion from a limited forum for student speech. To affirm the Fifth Circuit's judgment will discourage governmental units from enacting equal access policies that protect religious speech expressed by private speakers.

SUMMARY OF ARGUMENT

The Santa Fe Independent School District has properly established a limited public forum for student speech. Although this Court need not resolve the public forum issue to decide this case, it is an additional grounds for reversing the judgment below and upholding the policy. This is the speech

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[1] Both counsels of record have filed letters with the Clerk of Court consenting to the filing of all amicus curiae briefs in this case. Pursuant to Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members and its counsel have made a monetary contribution to the preparation or submission of this brief. Amicus has submitted a request for funding with the Alliance Defense Fund of Scottsdale, Arizona, but that group has not yet acted on the request at the time this brief was filed.

of private, individual students, not government speech. *See Widmar v. Vincent*, 454 U.S. 263 (1981).

The policy is consistent with the public forum doctrine with its mechanism allowing students to select whether to have student speakers at the football games and then select who the speakers will be. Because the forum allows only one speaker at the few home football games, there needs to be some content-neutral selection process to determine which students will speak in this forum, which the school district uses here.

The policy's selection mechanism here is similar to the situation of American voters electing the President of the United States, whose duties include giving an inauguration speech. Over the centuries, Presidents have prayed or made references to God during their inauguration speeches, yet this does not violate the Establishment Clause. "Presidential references to God during an Inaugural Address ... present no risk of establishing religion." *Lynch v. Donnelly*, 465 U.S. 668, 717 (1984).

There is no Establishment Clause violation when private individual speakers express themselves with religious speech in a limited forum they are eligible to speak in. In fact, the school district would violate the students' freedom of speech and engage in unconstitutional content or viewpoint discrimination if it excluded students' religious expression while permitting all other student expression in the forum. The Fifth Circuit's judgment should be reversed.

ARGUMENT

I.

THE SCHOOL DISTRICT HAS CREATED A LIMITED FORUM FOR STUDENT SPEECH WITH ITS FOOTBALL GAME POLICY

A. The School District Has Followed First Amendment Standards To Establish A Limited Forum For Student Speech.

The Santa Fe Independent School District ("Santa Fe") has created a limited forum for student speech with its policy permitting students to speak before the football games. This Court need not resolve the public forum issue to decide this case. This Court can answer the question presented that student-led, student-initiated prayer does not violate the Establishment Clause without reference to the public forum doctrine. However, the court below analyzed the case in terms of the public forum doctrine, which this Court spelled out in *Widmar v. Vincent*, 454 U.S. 263 (1981) and other cases.

When applied properly, the public forum doctrine gives an additional ground to reverse the holding of the Fifth Circuit and to uphold the Santa Fee policy at issue in this case. Santa Fe has designated a small portion of the time before the home football games as a limited forum for student speech.

Public schools may create a forum by policy or practice. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 267 (1988); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47 (1983). Government, like the Santa Fe school district, may also create a "limited forum,"

-- "created for a limited purpose such as use by certain groups, *e.g., Widmar v. Vincent* (student groups) or for the discussion of certain subjects, *e.g., City of Madison Joint District v. Wisconsin Public Employment Relations Commission* (school board business)." *Perry*, 460 U.S. at 45 n.7.

Here, the school district has created a limited forum for student speakers to speak for a short period of time before the home football games. The Fifth Circuit characterized the football game prayer policy as providing "for a student-selected, student-given 'brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games ....'" *Doe v. Santa Fe Independent School District*, 168 F.3d 806, 825 (5th Cir. 1999). Therefore, by policy, Santa Fe has carved out a period of time for private speech by individual students. The limit on the forum is by identity of the speaker, not the content of the speaker's message.

Because the school district has not limited the forum on the basis of subject matter, it cannot prohibit otherwise eligible student speakers from speaking because their messages contain religious content. If Santa Fe allowed all student speech except religious speech, it would violate the freedom of speech rights of the student speakers. "'Where the State has opened a forum for direct citizen involvement,' exclusions bear a heavy burden of justification." *Widmar*, 454 U.S. at 268, quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555-559 (1975).

B. The School District's Forum For Student Speech Is Not A Pretext Or Subterfuge To Violate The Establishment Clause.

The Fifth Circuit rejected Santa Fe's argument that it

had created a limited forum for student speech. Instead, the court below found the policy to be an underhanded attempt to violate the Establishment Clause by having the students do what the school district could not do openly - promote religion. *Doe*, 168 F.3d at 822.

The Fifth Circuit placed much emphasis on its view that the forum created by the Santa Fe School Board was not a limited public forum, as asserted by the school district, but was "no forum at all." *Doe*, 168 F.3d at 822. It reasoned that the limited number of speakers, the "monolithically non-controversial nature" of the forum, and the tightly restricted and "highly controlled form of 'speech' involved," *id.*, all militated against labeling such ceremonies as any type of public forum. Therefore, the Fifth Circuit reasoned, because the student speakers were not independent private actors but mere shills for the state, the Santa Fe policy violated the Establishment Clause. *Id.*

The Fifth Circuit erred by assuming that private speakers are not really private actors if the forum is significantly regulated as it is here. Whether a forum is high regulated does not convert private speakers into government actors. Even a private speaker speaking in a nonpublic forum has protected First Amendment rights. *See, e.g., Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985) (Combined Federal Campaign is a nonpublic forum for private charities to solicit contributions from federal employees, and the solicitations are "protected speech occurring in the context of a nonpublic forum." *Id.* at 797.

Therefore, even though the school district has regulated its limited forum, the First Amendment protects the rights of the chosen students to speak at the home football games. The fact that a forum is highly regulated does not eliminate all First

Amendment protections of the private persons speaking there.

The Fifth Circuit erred by misconstruing the critical components of the Santa Fe policy that made the messages the end result of many private decisions that are not directed by the state. In other words, if the school district were trying to ensure that the students would invariably vote for prayer at the football games, the school district created a policy that does not achieve that goal.

The policy builds at least three breakpoints separating the decisionmaking from the government and giving it into the hands of private individuals. First, the students decide whether there is a student speaker or not. Application to the Petition for Certiorari at F1. If the students decide that there shall be a speaker, then the students vote again to select the speaker. *Id.* Then the speaker can choose what to say at the football game. *Id.* The policy does not guarantee that there will be a speaker, and does not guarantee that the message delivered will contain religion. Therefore, this policy is not a surreptitious attempt by the school district to have the students promote religion. There is no pretext or subterfuge here. This is the case of a school district's efforts to accommodate private student speech.

C. The Selection Process of a Majority Vote Is Consistent With the Public Forum Doctrine.

The fact that a majority of students decide whether there will be speakers at the football games, and who those speakers will be, is consistent with the public forum doctrine. The typical equal access case has private individuals or groups select themselves to speak at various times in a place the government opens for expressive activities. *See, e.g., Widmar v. Vincent,* 454 U.S. 263 (1981) (university students decided on their own whether to use campus meeting space).

There is nothing inconsistent with having a public forum, or a limited public forum, where the speakers are selected by popular vote. If the nature of the forum allows only one speaker at a time, then the government needs some selection method to choose who gets the opportunity to speak. The school district could have chosen a random lottery, or class rank to determine the speakers, but it chose a student vote.

There is no concern that this policy allows the majority to impose a consistent religious message on all other students and those attending the football games. Nothing in the plain language of policy insures that the student speakers will give religious messages. In fact, the policy does not even insure that there will be a student speaker at all. The policy does not dictate the content of the message spoken by the student selected. The policy does not contain any viewpoint or contest-based restrictions on the student's speech. The students could vote to have no message at all. If they did decide to have a message and select a student to give it, the student has the independent discretion to choose what he or she will say. This is not a situation in which a majority imposes its ideological views on a dissenting minority.

This situation is analogous to the selection of the United States President, who then delivers his Inaugural Address. Only one person can be President at a time, and only one President can deliver the Inaugural Address. American voters select the President knowing that one thing he will do is give a nationally-televised speech at his inauguration. Although the President is the head of the United States government's executive branch, his Inaugural Address expresses his personal thoughts and is protected under the First Amendment.

Presidents from George Washington to George Bush have prayed during their inaugural addresses. *Lee v. Weisman,*

505 U.S. 577, 634 (1992) (Scalia, J., dissenting). Although the Inauguration is a government event, there is no Establishment Clause violation when the new President refers to religion in his Inaugural Address or requests everyone assembled to bow and pray. "Presidential references to God during an Inaugural Address ... present no risk of establishing religion." *Lynch v. Donnelly*, 465 U.S. 668, 717 (1984). The reason that there is no Establishment Clause violation is because the Inaugural Address is the private speech of the President and is protected under the First Amendment's Freedom of Speech Clause.

Similarly, the student body selects individuals to speak at the football games. Those selected students speak the message they have chosen free of governmental influence or control at a limited forum created by the school district. Santa Fe could not constitutionally prohibit religious speech from these speakers without violating the First Amendment rights of the student speakers. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969).

II.

THERE IS NO ESTABLISHMENT CLAUSE VIOLATION WHEN THE GOVERNMENT ACCOMMODATES PRIVATE SPEECH IN A LIMITED PUBLIC FORUM

A. The First Amendment Prohibits The Government From Singling Out Religious Speech For Exclusion From Its Forum.

Santa Fe's policy allowing students to select a speaker to "deliver a brief invocation and/or message" before the home

football games is a "neutral accommodation" of private student speech, as Judge Jolly stated in his dissent. *Doe*, 168 F.3d at 825. If the school district were to amend its policy to permit all speech by the student speakers except that with religious content, it would engage in unconstitutional content-based or viewpoint-based discrimination. This would violate the constitutional principles laid out in such cases as *Widmar*, *Board of Educ. v. Mergens*, 496 U.S. 226 (1990), *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 967 (1993) and *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995). These cases all held that the government may not exclude speakers from a forum they are eligible to speak in because of the religious content or viewpoint of their messages. "Where the State has opened a forum for direct citizen involvement, exclusions bear a heavy burden of justification." *Widmar*, 454 U.S. at 268.

Most of the cases that have come before this Court involving content-based and viewpoint-based exclusions from public forums have excluded religious speech. One major purpose of the First Amendment, this Court has stated, was to protect religious speech from governmental suppression. In *Capitol Square Review Board v. Pinette*, 515 U.S. 753 (1995), this Court stated in the majority opinion:

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free speech clause without religion would be *Hamlet* without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, *Heffron, supra*, at 647, or even acts of worship, *Widmar*, supra at 269, n. 6.

Pinette, 515 U.S. at 760.

Of course, the school district can constitutionally exclude people from the forum, like non-students, because they do not meet the initial eligibility standards. *Cornelius,* 473 U.S. at 806. If a student is otherwise eligible to speak, the school district may not limit the message he or she gives at the football game because it is religious. Santa Fe's policy creates a limited forum based on identity of the speaker, not on content of the message. The policy permits only students selected by the student body to speak, but does not limit the content of their messages. It would violate the First Amendment for the school district to limit the speech of the student speakers because of their content. "[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Id.*

Even if this Court were to find that Santa Fe operated a nonpublic forum, it still could not prohibit eligible speakers from giving a religious message, because this would be unreasonable viewpoint discrimination. "Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius,* 473 U.S. at 806. *See also Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983).

Therefore, the school district's policy conforms with the First Amendment by allowing all speech by eligible students. It would violate the First Amendment to single out religious speech for exclusion from this forum.

B. The School District Does Not Endorse The Religious Views Expressed By Speakers In A Public Forum.

When a school district sets up a public forum, it does not endorse the views of any of the private speakers who speak there. Therefore, Santa Fe's policy does not violate the Establishment Clause by permitting students to deliver messages with religious content, when it allows the student speakers to speak on all other topics. Government does not endorse the speech of private citizens simply by allowing them to speak. In *Widmar*, this Court stated:

> An open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . to religious goals" than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities. 635 F.2d, at 1317.

Widmar, 454 U.S. at 274. This Court also said in *Widmar*:

> But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

Widmar, 454 U.S. at 271-72, n.10.

Again, in *Mergens,* this Court clearly stated that public

schools do not violate the Establishment Clause when they allow student religious groups to meet on campus. *See Mergens*, 496 U.S. at 248-253. This Court in *Mergens* made the helpful observation that government accommodation of private religious speech does not equal government sponsorship of that speech:

> [T]here is a crucial difference between *government* endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.

Mergens, 496 U.S. at 250 (emphasis in the original).

This Court in *Lamb's Chapel* reiterated the basic holding of *Widmar* that permitting private speakers to express religious speech in a forum open for secular speech does not violate the Establishment Clause:

> We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded.

Lamb's Chapel, 508 U.S. at 395.

This Court's decision in *Rosenberger* repeated the principle that religious groups may not be excluded from government forums because of the religious content of their speech:

> More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free

> speech rights to religious speakers who participate in broad-reaching government programs neutral in design. *See Lamb's Chapel*, 508 U.S. at 393-394; *Mergens*, 496 U.S. at 248, 252; *Widmar, supra* at 274-275.

Rosenberger, 515 U.S. at 839.

Also this Court explained in *Pinette*, why it did not violate the Establishment Clause for the Ku Klux Klan to erect a cross in an area near the Ohio state capitol:

> Quite obviously, the factors that we considered determinative in *Lamb's Chapel* and *Widmar* exist here as well. The State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups.

Pinette, 515 U.S. at 763.

The government cannot make the right to exercise speech within a forum contingent upon the viewpoint of the speaker or the message. Santa Fe, well aware of its constitutional duty to accommodate private speech in a limited forum, drafted a policy to protect the rights of student speakers from content and viewpoint based discrimination. The Fifth Circuit wrongly ruled that such a policy violated the Establishment Clause, when instead, it fulfilled the school district's duties under the Freedom of Speech Clause.

CONCLUSION

Amicus curiae Northstar Legal Center respectfully requests that this Court reverse the judgment of the Fifth Circuit.

Date: December 30, 1999

Respectfully submitted,

JORDAN W. LORENCE
Northstar Legal Center
P.O. 2074
Fairfax, Virginia 22031
(703) 359-8619
Counsel of Record

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No. 99-62

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Petitioner,

v.

JANE DOE, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILDREN, JANE AND JOHN DOE, MINOR CHILDREN; JANE DOE #2, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILD, JOHN DOE, MINOR CHILD, AND JOHN DOE, INDIVIDUALLY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

James A. Hayes, Jr.
Ashworth, Hayes & Moran
28202 Cabot Road
Suite 100
Laguna Niguel, California
92677-1247
(949) 347-7900

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia
22901
(804) 978-3888

December 29, 1999

26pp

No. 99-62

In The
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Petitioner,

v.

JANE DOE, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILDREN, JANE AND JOHN DOE, MINOR CHILDREN; JANE DOE #2, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILD, JOHN DOE, MINOR CHILD, AND JOHN DOE, INDIVIDUALLY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Rutherford Institute hereby respectfully moves the Court for leave to file the following brief *amicus curiae* in this case. The consent of counsel for the Petitioner has been obtained. The consent of counsel for the Respondents has been requested and refused.

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on

behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989) and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over two dozen *amicus curiae* briefs in the United States Supreme Court, including the following cases: *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Davis v. Monroe County*, 119 S. Ct. 29 (1998); *Kolstad v. American Dental Association*, 119 S. Ct. 2118 (1999); *Slack v. McDaniel*, Sup. Ct. No. 98-6322 (October Term 1998) and *State of Wyoming v. Houghton*, 119 S. Ct. 1297 (1999), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred cases nationally, including numerous public school issues involving the Establishment Clause, the Freedom of Speech Clause and the Free Exercise of Religion Clause. The Institute has published educational materials and taught continuing legal education seminars in this area as well.[1]

The Rutherford Institute is submitting a brief *amicus curiae* in support of the Petitioner. In light of the important

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[1] John W. Whitehead has published several dozen books and articles on constitutional and civil rights issues. *See, e.g., Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 TULSA L. REV. 149 (1992); *The Conservative Supreme Court and the Demise of the Free Exercise Clause*, 7 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997); and *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's 1997-1998 Term*, 71 TEMPLE POL. & CIV. RTS. L. REV. 773 (1998). The Institute also publishes informational pamphlets and briefs addressing employment discrimination and workplace accommodation, free speech, and other civil rights topics.

issues being raised in this case, the Institute respectfully requests that its arguments be heard.

Respectfully submitted,

John W. Whitehead
Steven H. Aden (Counsel of Record)
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia 22901
(804) 978-3888

James A. Hayes, Jr.
Ashworth, Hayes & Moran
28202 Cabot Road
Suite 100
Laguna Niguel, California
92677-1247
(949) 347-7900

December 29, 1999

QUESTIONS PRESENTED FOR REVIEW

Whether Petitioner's policy permitting student-led, student-initiated prayer at school football games violates the Establishment Clause.

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No. 99-62

In The
SUPREME COURT OF THE UNITED STATES

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

JANE DOE, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILDREN, JANE AND JOHN DOE, MINOR CHILDREN; JANE DOE #2, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILD, JOHN DOE, MINOR CHILD, AND JOHN DOE, INDIVIDUALLY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF *AMICUS CURIAE*[2]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by

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2 The Rutherford Institute has requested consent from all parties. The Petitioner has consented to the filing of this brief; the Respondent has not. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989) and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over two dozen *amicus curiae* briefs in the United States Supreme Court, including the following cases: *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Davis v. Monroe County*, 119 S. Ct. 29 (1998); *Kolstad v. American Dental Association*, 119 S. Ct. 2118 (1999); *Slack v. McDaniel*, Sup. Ct. No. 98-6322 (October Term 1998) and *State of Wyoming v. Houghton*, 119 S. Ct. 1297 (1999), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred cases nationally, including numerous public school issues involving the Establishment Clause, the Freedom of Speech Clause and the Free Exercise of Religion Clause. The Institute has published educational materials and taught continuing legal education seminars in this area as well.[3]

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3 John W. Whitehead has published several dozen books and articles on constitutional and civil rights issues. *See, e.g., Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 TULSA L. REV. 149 (1992); *The Conservative Supreme Court and the Demise of the Free Exercise Clause*, 7 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997); and *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's 1997-1998 Term*, 71 TEMPLE POL. & CIV. RTS. L. REV. 773 (1998). The Institute also publishes informational pamphlets and briefs addressing employment discrimination and workplace accommodation, free speech, and other civil rights topics.

STATEMENT OF THE CASE

The Court's *amicus* adopts the statement of facts and the statement of the case that Petitioner, Santa Fe Independent School District, has provided in its Opening Brief.

ARGUMENT

The Santa Fe School Board amended its policy concerning prayers at school football games to allow the students themselves to decide whether or not to accept the platform (hereinafter referred to as "Football Game Policy".) Every decision and action relating to the prayers' presentation was controlled by students. Although the students' decision was permitted by the school, it was not encouraged or coerced by the school. The Fifth Circuit panel majority erred, therefore, in concluding that the football game prayers were school-sponsored and school-controlled.

Furthermore, the court erred dramatically in holding that this Court's precedent, *Lee v. Weisman*, 505 U.S. 577 (1992) requires that only at "solemn," "significant," "once-in-a-lifetime," "frequently-recurring," and "formal" school-sponsored events can "non-sectarian, non-proselytizing" prayer be permitted constitutionally. Nowhere in this Court's Religion Clause jurisprudence, let alone *Lee*, can such a test be found requiring courts to evaluate and determine if a school event is "solemn" enough to permit citizens to express themselves publicly with prayer and then further to evaluate and determine if the proposed prayer is "non-sectarian, non-proselytizing." To the contrary, this Court's teachings, cited exhaustively by the dissent to the panel's decision, plainly prohibit the courts from engaging in these kinds of value judgments regarding the content and expression of individuals' religious beliefs.

Petitioner's Football Game Policy can be upheld as constitutional using traditional Establishment Clause and Free Speech/limited public forum analysis, without resorting to the entanglement of the courts in evaluating religious viewpoints, as advanced by the Fifth Circuit panel majority.

I. THE SANTA FE POLICY DOES NOT CONSTITUTE AN "ESTABLISHMENT OF RELIGION" IN VIOLATION OF THE FIRST AMENDMENT

A. There Can be No Violation of the Establishment Clause Where the Speech at Issue is Purely Private Speech and Not Government Action

The Establishment Clause limits the power of government to promote or engage in religious activity. Where the impetus for religious activity is purely of private initiative and design, however, there is no state action and the Establishment Clause does not proscribe the conduct. *Capital Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 760 (1995). This is true even if there is government assistance, so long as the criteria for receiving that assistance is neutral with respect to religion. *See Bowen v. Kendrick,* 487 U.S. 589 (1988); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998) (no state action leading to endorsement problem where school officials merely permitted private individuals on a viewpoint-neutral basis to place Bibles on school property).

The Football Game Policy is written in such a way that it grants permission to the students to hold a secret ballot to allow prayers at football games, but it in no way requires the

students to hold or participate in the voting process. Once the vote does take place, the only other action by the school is to give the platform over to the students. Therefore, the speech is purely private when given. There is no government action which compels the speech or assists in drafting its content.

B. Assuming *Arguendo* the Establishment Clause is Implicated by the Football Game Policy, It Still Passes Constitutional Muster as an Appropriate Accommodation of Student and Community Beliefs

1. There is no "endorsement" involved, as no reasonable observer could perceive a government "endorsement" of religion where the students alone directed and controlled the platform.

In *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990), this Court held that a public school does not unconstitutionally endorse religion by permitting a religious club to meet on school grounds and recruit members through the school's newspaper, bulletin boards, public address system, and annual club fair. *Id.* at 247-53.[4] The Court emphasized that:

> "[T]here is a "crucial difference" between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."

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[4] The Court affirmed the constitutionality of the Equal Access Act (20 U.S.C. §§ 4071-4074), which grants religious clubs the same privileges as those of other non-curricular student organizations.

Id. at 250 (emphasis in original).

The *Mergens* Court thus acknowledged that secondary school students are mature enough not to attribute official school endorsement to student religious groups merely because the school permits the groups to meet and to enjoy the privilege of disseminating information about their group. *Id.* See also *Hedges v. Wauconda Community Union Sch. Dist.*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993) ("ignorant bystanders cannot make censorship legitimate. . . . Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether . . . schools can teach anything at all. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons.") The same rationale clearly applies to student-initiated and directed prayer.

This distinction between government action endorsing religion and private religious speech was also critical to the Supreme Court's rationale in *Lee v. Weisman*, 505 U.S. 577 (1992). In *Lee*, the principal of a public school invited a local member of the clergy, a Jewish rabbi, to give "non-sectarian" prayers and provided the rabbi with guidelines as to the content of the prayers. *Id.* at 581. A student, Deborah Weisman, challenged the legality of these prayers on Establishment Clause grounds.

While no particular Establishment Clause approach garnered a majority, the Court's plurality held that when a public school official invites a member of the clergy to deliver a graduation prayer, and when the official advises the member of the clergy on how to deliver that prayer, there is a violation of the Establishment Clause. *Id.* at 597. However, Justice

Souter, in a concurring opinion joined by Justices Stevens and O'Connor, wrote:

> "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State."

Id. at 606 (Souter, J., concurring).

Thus, these Justices have suggested it is permissible for a valedictorian to include a religious message in his or her valediction. It is difficult to see how, if this student-initiated action could be constitutional, that the decision to pray at a football game arrived at by a majority vote of the students could be any less so. It would seem irrelevant, once the school district has delegated that decision to the student body, what process the students undertake to arrive at these decisions.

Recently, in *Chandler v. James*, 1999 U. S. App. LEXIS 15608 (11th Cir. 1999), the Eleventh Circuit ruled that the district court could not constitutionally enjoin a school from permitting student-initiated religious speech in its schools. *Id.* at 8. The case concerned an Alabama statute that permitted "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benediction during compulsory or non-compulsory school-related events." *Id.* at 2. These events included student assemblies, sporting events, graduation or commencement ceremonies, and other related student events. *Id.* The Eleventh Circuit found that

> it is not the 'permitting' of religious speech which dooms [unconstitutional school policies under the Establishment Clause], but rather the *requirement* that

> the speech be religious, i.e., invocations, benedictions, or prayers.

Id. at 11 (emphasis added).

In *Chandler*, the school did not require the students' speech to be religious. The school was merely permitting its students, if they so desired, to voluntarily engage in non-sectarian, non-proselytizing prayer, action which the school believed was permitted by the First Amendment. *Id.* at 15. Permitting students to speak does not reflect a school's "endorsement" of the speech in a manner that would violate the First Amendment. This was reinforced by the court when it stated,

> [t]he suppression of student-initiated religious speech is neither necessary to, not does it achieve, constitutional neutrality towards religion. For that reason, the Constitution does not permit its suppression.

Id. at 16.

The court further emphasized that endorsement and disapproval of religion are equally unconstitutional:

> "Cleansing" our public schools of all religious expression, however, inevitably results in the "establishment" of disbelief - atheism - as the State's religion. Since the Constitution requires neutrality, it cannot be the case that government may prefer disbelief over religion.

Id. at 18.

2. There is no "coercion" involved in the

Football Game Policy, as that term is understood in this Court's Establishment jurisprudence.

In *Lee,* Justice Kennedy's plurality opinion emphasized that the crucial factor in determining whether coercion exists in a prayer case is whether state officials have directed the performance of a formal religious exercise. 505 U.S. at 586-590. Justice Kennedy observed:

> [T]he school district's supervision and control of a high school graduation ceremony places public and peer pressure on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.

Id. at 593.

In short, Justice Kennedy's plurality opinion in *Lee* turned on four factors. First, the case involved a public school. *Id.* at 581. Second, school officials and teachers were active in planning the graduation ceremony, inviting a person to offer graduation prayers, and advising the clergy member on the content of his prayers. *Id.* Third, a local member of the clergy offered the graduation prayers. *Id.* Fourth, the case involved a graduation ceremony that graduates and their families might have felt an obligation to attend, even though their attendance was not mandatory. *Id.* at 595.

Here, the context is not a graduation ceremony, but school football games. School officials and teachers are not involved in planning the prayers or inviting persons to offer them because the decision to pray and the presentation is left entirely to the students. No clergy are involved. Equally as

important, attendance at the football games is not mandatory or in any sense obligatory. Members of the general public can attend the games, as well as students and their parents. No one attending a game for its own sake is compelled to sit and listen to the student-led prayer. There is nothing in the record evidencing or even suggesting that an attendee's absence from the stands during the prayer would be noticed, let alone subject to some social opprobrium. The Football Game Policy, therefore, meets none of the *Lee* factors constituting "coercion" in a prayer context.

3. The Santa Fe Policy does not result in "excessive entanglement" from indirect promotion of sectarian activity.

Concerns over "indirect benefit" to sectarian activities was in part the basis for the Fifth Circuit's conclusion that the policy violated the Establishment Clause:

> "Prayers that schools "merely" permits will still be delivered ... by means of government-owned appliances and equipment, on government-owned property... thereby clearly raising Establishment Clause concerns."

Santa Fe, 168 F.3d at 817.

The Fifth Circuit's concerns in this regard are unfounded in light of this Court's modern Establishment Clause jurisprudence. For decades, this Court's sectarian school funding decisions were arguably in conflict. Recently, however, in a line of decisions which includes *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U. S. 1 (1993), and *Agostini v. Felton*, 521 U.S. 203 (1997), the Court has substantially resolved any confusion by articulating a rule that

aid to sectarian education is permissible as long as the aid is provided under religiously neutral funding criteria. *Witters*, 474 U.S. at 487; *Zobrest*, 509 U.S. at 10; *Agostini*, 521 U.S. at 234-35. This rule, however, is simply an alternative formulation of the state action test. So long as the funding conditions are religiously neutral, and the decision to commit the funds to sectarian education is made by private individuals, not the state, the Establishment Clause is not implicated. *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 487; *Agostini* 521 U.S. at 226.

The issue of student-initiated prayer is directly analogous to that of state funding. In the funding cases, the state provides aid that ultimately may be used for religious purposes. Here, the state is providing a limited forum (*e.g.* a football game) which ultimately may be used for religious purposes. The Court in *Agostini* pointed out that the common thread running through the funding cases was that "any money that ultimately went to religious institutions did so 'only as a result of the genuinely independent and private choices of individuals.'" 521 U.S. at 226. The funding program's neutral eligibility criteria ensured that the religious use of the funds "was a 'result of the private decision of individual parents' and '[could] not be attributed to state decision making.'" *Id.* (citing *Zobrest*, 509 U.S. at 10). Once again, in this case, the decision whether to have prayer, or even whether to vote on having prayer, at a football game rests entirely with the students, indisputably private individuals. The students must take the initiative and ask for a vote. The school is merely providing a forum under a religiously neutral policy, which is substantially similar to the provision of indirect aid under religiously neutral criteria.

Furthermore, in the funding cases, the Court pointed out that the aid created "no financial incentive for students to

undertake sectarian education." *Witters*, 474 U.S. at 488. Likewise, in the instant case, the Football Game Policy creates no incentive for students to take a vote to pray; it only states what they should do if they want to initiate prayer. In both contexts, the key is that the decision to use the funds or the forum in a religious manner is made by private persons, not the state. Thus there is no state action and no Establishment Clause violation.

II. THE FOOTBALL GAME POLICY IS A PERMISSIBLE ACCOMMODATION OF THE STUDENTS' RIGHT OF FREE SPEECH

Any student who chooses to recite a prayer on his or her own initiative may assert his right to freedom of speech under the First Amendment.[5] Therefore, it is permissible for students to pray publicly at a school football game in accordance with the Football Game Policy. When they do so, the two elements of the *Lee* decision are missing: *first*, no school official is participating in selecting the speaker or the content of the speech; and *second*, the person offering the speech is a student rather than a member of the clergy.

A. Once the Santa Fe Independent School District Gave the Football Game Platform to the Students, The Students Possessed a First Amendment Right to Present a Prayer Free of Government Censorship as to the Content.

The Fifth Circuit panel majority erred in concluding

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5 *See generally, Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Tinker v. Des Moines Indep. Community Sch. Dist.* 393 U.S. 503 (1969); *Mergens*, 496 U.S. at 226; *Engel v. Vitale*, 370 U.S. 421 (1962); *Madison*, 147 F.3d at 832; and *Clear Creek II*, 977 F.2d at 963.

that the Supreme Court's free speech precedents were inapplicable to this dispute. The court reasoned that the school, by delegating to students virtually complete control over the decision to pray at football games and control over the content of the prayer, did not create a limited public forum. The court further concluded that football games are not "solemn," "significant," "once-in-a-lifetime," "frequently-recurring," and "formal" school-sponsored events where "non-sectarian, non-proselytizing" prayer can be permitted constitutionally. Remarkably, the court based this conclusion on *Lee*, which not only provides no support for such a judicial evaluation of the forum for religious expression, or of the proposed expression itself, but in fact prohibits it.

Assuming that Santa Fe did not create either an open or limited public forum at its high school football games, a rule prohibiting student-initiated religious expression,[6] and only religious expression, would still contravene the Supreme Court's free speech precedents. Even in non-public fora, government is prohibited from regulating expression based on viewpoint.[7] *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), this Court unanimously held

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6 It has been suggested by one commentator that there is a distinction between verbal acts of worship, such as prayer, and religious expression. Comment, *Student-Initiated Religious Expression*, U. CHI. L. REV. 1565, 1583-84 (1994). This distinction was suggested by Justice White in his dissent in *Widmar*, 454 U.S. at 283-84 & n.2 (White, J., dissenting). This Court explicitly rejected that view, labeling it novel, unintelligible, and unprincipled. *Id.* At 269 n.6. Justice White's view articulated in *Widmar* has not resurfaced in any subsequent decisions. Although he was the sole dissenter in *Widmar*, Justice White wrote for a unanimous Court in striking down similar restrictions on religious expression on public school property in *Lamb's Chapel*, 508 U.S. at 384.

7 *International Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992); *Cornelius*, 473 U.S. at 800, 806 (both cases quoting *Perry*, 460 U.S. at 45).

that a school district violated the Free Speech Clause by denying a religious group access to public school premises solely because the group intended to use the building to show a film that dealt with an otherwise permissible subject from a religious perspective. The Court held that speech restrictions that target religious expression discriminate based not only on subject matter but also impermissibly on viewpoint. *Id.* at 393-94; *see also Rosenberger v. Regents of the Univ. of Va.*, 515 U.S. 819 (1995).

The Fifth Circuit panel majority's decision also cannot be reconciled with the Supreme Court's decision in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). *Tinker* involved two high school students and one junior high school student who were suspended from school because they refused to remove black arm bands worn to protest the Vietnam War. The Court held that school officials could not restrict student-initiated expressive conduct unless the conduct could be shown to undermine the discipline of the school or collide with the rights of other students to be secure and let alone. *Id.* at 508.

Presumably, teachers at the high school and junior high school in *Tinker* were in a position to exercise far more control over student expression than was exercised by the Santa Fe officials at the football games. Classmates of the *Tinker* plaintiffs were no more "captive" than were those who attended the Santa Fe's football games. In *Tinker*, objecting students could (and in fact did) express their disagreement at appropriate times and in appropriate manners, but they were expected to "endure" the message that their peers sought to communicate by wearing the black arm bands. This tolerance for student speech should also apply to religious expression at Santa Fe's football games.

B. Censorship of the Students' Activities At Football Games for Religious Content Would Violate the "Excessive Entanglement" Prong of the *Lemon* Test and Constitute Impermissible Governmental Hostility Toward Religion.

The fact that student prayer at the football games may have indirectly advanced religion and were undertaken with a religious motive does not implicate the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). It may be that one purpose of prayer is to advance religion,[8] but the instant case is distinguishable from the prayer presented in *Lee* in that the religious acts and motives of the Santa Fe students were not those of the government.

The Supreme Court has repeatedly refused to construe the Establishment Clause to authorize government to censor student-initiated religious expression. *See Lamb's Chapel*, 508 U.S. at 384; *Mergens*, 496 U.S. at 247; *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981). The risk of an Establishment Clause violation is precisely the type of vague and ill-defined fear that the *Tinker* Court held insufficient to justify abridgement of students' free speech rights. *Tinker*, 393 U.S. at 513-14.

The same analysis should be applied to the instant case. The Establishment Clause is not abridged so long as no religious criterion is employed in granting access to the forum.[9] But this also is simply an alternative formulation of a state action test. So long as the grant or denial of access to the forum is not based on religious criteria, the decision to use the

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[8] *Marsh v. Chambers*, 463 U.S. 783 (1983).

[9] *See Lamb's Chapel*, 508 U.S. 384. *Mergens*, 496 U.S. at 226; *Widmar*, 454 U.S. at 263.

forum for religious purposes is made by one or more private individuals, not the state.

CONCLUSION

For all the foregoing reasons, this Court's *amicus* respectfully requests that this Court vacate the Fifth Circuit's decision and remand the case for further proceedings.

Respectfully submitted,

John W. Whitehead
Steven H. Aden (Counsel of Record)
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia 22901
(804) 978-3888

James A. Hayes, Jr.
Ashworth, Hayes & Moran
28202 Cabot Road
Suite 100
Laguna Niguel, California
92677-1247
(949) 347-7900

(16)

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SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* SPEARMAN INDEPENDENT SCHOOL DISTRICT, CARTHAGE INDEPENDENT SCHOOL DISTRICT, DILLEY INDEPENDENT SCHOOL DISTRICT, IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT, McCAMEY INDEPENDENT SCHOOL DISTRICT, MADISONVILLE INDEPENDENT SCHOOL DISTRICT, NEWTON INDEPENDENT SCHOOL DISTRICT and LORENA INDEPENDENT SCHOOL DISTRICT, IN SUPPORT OF PETITIONER

ROGER D. HEPWORTH
HENSLEE, FOWLER, HEPWORTH & SCHWARTZ, L.L.P.
800 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701
(512) 708-1804

Counsel of Record for Amici

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I.

STATEMENT OF *AMICI* INTEREST

Spearman Independent School District, Carthage Independent School District, Dilley Independent School District, Iraan-Sheffield Independent School District, McCamey Independent School District, Madisonville Independent School District, Newton Independent School District and Lorena Independent School District appear as *amici curiae* and urge the Court to reverse the decision of the Fifth Circuit.[1] *Amici curiae* have an interest in the case because the Fifth Circuit's judgment will require them to review and essentially censor student-initiated and student-given speech even though there is no state involvement in the decision that the speech occur or in the selection of the speaker. *Amici's* interest here is substantial and direct, because the holding directly governs decisions and policies adopted by these school boards. Under this decision:

- School officials will be subjected to potential litigation by students who feel their First Amendment rights are violated by requiring administration or school boards to exercise control over allowance of or the content of their pre-activity statements or graduation solemnization.

- Officials will be required to demonstrate hostility toward sectarian religion in favor of

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[1] Counsel for a party did not author this brief, in whole or in part. No person or entity, other than *amici curiae*, or its counsel, made a monetary contribution to the preparation and submission of this brief.

ecumenical religion, resulting in establishment of a state religion, that of atheism or ecumenical religion.

- The decision will require the school to exert control over the student prayers, resulting in (a) violating their First Amendment right to freedom of speech, and (b) excessive entanglement.

- The decision will require the school to outlaw student-initiated and student-led prayer, even though that is not governmental action by any definition.

This decision places the school districts in an untenable position, despite established precedent to the contrary.

The parties have given their consent to the filing of this brief, as shown in the blanket consent letter already on file with the Court. Sup. Ct. R. 37.2(a).

SUMMARY OF THE ARGUMENT

"God save the United States and this Honorable Court."

Thus begins each session of the United States Supreme Court since the days of Chief Justice Marshall.[2] If a student at a football game or graduation ceremony used this phrase, but substituted the phrase "school district" for the phrase "Honorable Court," has that student

[2] J.C. Warren, The Supreme Court in the United States History 469 (1922).

violated the Establishment Clause of the First Amendment? In fact, the Fifth Circuit has ignored the general tradition of prayer at public ceremonies that has existed since the beginning of this nation and struck down student-initiated prayer for all activities except for graduation.

If the Fifth Circuit's decision in *Doe v. Santa Fe ISD*, 168 F.3d 806 (5th Cir. 1999), is not overturned, school officials will be put in the untenable position of having to show hostility toward religion by barring any religious speech except at graduation. School officials may be forced to deny students their freedom of speech at graduation ceremonies as well since any prayers that are offered are subject to the guidelines and editing requirements of the Fifth Circuit – namely, that the prayers be nonsectarian and nonproselytizing. This decision cannot be allowed to stand for three main reasons:

1. The Fifth Circuit's decision violates the requirement that governments be neutral in the realm of religion. This decision demonstrates hostility toward secular religion and favors ecumenical religion or non-religion (atheism) over sectarian religions. This results in establishment of a state religion, that of atheism or ecumenical religion, thus violating the Establishment Clause.

2. The prayers in question at football games or other school activities or at graduation are not governmental action. They are student-initiated and student-led. The Fifth Circuit's decision requires a school district to edit the content of graduation prayers, in violation of student constitutional rights.

3. The Fifth Circuit's decision requires that school officials exert control over the content of student prayers at graduation (in addition to not allowing them at football games or other activities). This violates the freedom of speech rights of the students, and it results in excessive entanglement of school districts with religion.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION FORCES SCHOOLS TO ABANDON THEIR CONSTITUTIONALLY REQUIRED NEUTRALITY AND SHOW HOSTILITY TO SECULAR RELIGION WHILE ADVANCING ECUMENICAL RELIGION OR ATHEISM.

The Fifth Circuit's decision ignores a long history of prayer at public gatherings and crosses the line that Justice Black warned of when he stated that courts must "be sure that [they] do not inadvertently prohibit [government] from extending its general . . . benefits to all . . . citizens without regard to their religious belief" by being overzealous in their enforcement of the Establishment Clause. *Everson v. Board of Educ. of Ewing Township*, 330 U.S. 1, 16 (1947). As mentioned in Judge Jolly's dissent in the Fifth Circuit's decision, this concern has been expressed eloquently by Justice Douglas *in Zorach v. Clauson*, as follows:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary.

> We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).

Justice Scalia's dissent in *Lee v. Weisman* contains an extensive discussion of the importance of history in the analysis of Establishment Clause jurisprudence.

> As we have recognized, our interpretation of the Establishment Clause should "compor[t] with what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). "[T]he line we must draw between the permissible and the impermissible is one which accords with history

and faithfully reflects the understanding of the Founding Fathers." *School Dist. of Abington v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring). "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied" to contemporaneous practices. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). Thus, "[t]he existence from the beginning of the Nation's life of a practice, [while] not conclusive of its constitutionality . . . [,] is a fact of considerable import in the interpretation" of the Establishment Clause. *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring).

> The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition. Illustrations of this point have been amply provided in our prior opinions, see, e.g., *Lynch*, supra, 465 U.S., at 674-678; *Marsh*, supra, 463 U.S., at 786-788; see also *Wallace v. Jaffree*, 472 U.S. 38, 100-103 (1985) (REHNQUIST, J., dissenting); *Engel v. Vitale*, 370 U.S. 421, 446-450, and n. 3 (1962) (Stewart, J., dissenting).

Lee v. Weisman, 505 U.S. 577, 632 (1992).

Justice Scalia went on to quote references or prayers to deity in the Declaration of Independence, inaugural addresses by George Washington, Thomas Jefferson, James Madison and congressional establishment of a day of thanksgiving and prayer (the day after passage of the First Amendment). Nearly every President has issued a Thanksgiving Proclamation, with a religious theme of prayerful gratitude to God. *Lynch v. Donnelly*, 465 U.S.

668, 675, n. 2 (1984); *Wallace v. Jaffree*, 472 U.S. 38, 100-103 (1985).

Justice Scalia also observed that, as detailed in *Marsh v. Chambers*, Congressional sessions have opened with a chaplain's prayer ever since the First Congress, 463 U.S. 783, 787 (1983), and that this Court's own sessions have opened with the invocation "God save the United States and this Honorable Court" since the day of Chief Justice Marshall. *Lee*, 505 U.S. at 635. In addition, prayers at high school graduations have occurred, by one account, since the first high school graduation in July of 1868. *Id.*

Additionally, our money is emblazoned with the motto "In God We Trust," and the pledge of allegiance includes the phrase "under God." Yet, the Fifth Circuit Court of Appeals refuses students (not district employees or agents) the opportunity to pray at any and all school events other than graduation, and then only after the school has edited out any reference to deity or sectarian religion.

If there is one point of law in this case that is clearly established, it is that the government must be neutral when it comes to religion. *Zorach*, 343 U.S. at 314. The government may not favor religion, but neither may it be hostile to religion. *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring). "In the relationship between man and religion, the State is firmly committed to a position of neutrality." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963).

The Fifth Circuit's holding goes well beyond the established constitutional requirement of neutrality and requires schools to show hostility to religion. *See Everson*,

330 U.S. 1; *Zorach*, 343 U.S. 306; *Engel*, 370 U.S. 421; *Schempp*, 374 U.S. 203; *Board of Educ. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226 (1990). This is constitutionally impermissible. The Eleventh Circuit addressed this same issue and found that "[t]he prohibition of all religious speech in our public schools implies, therefore, an unconstitutional *disapproval* of religion. If endorsement is unconstitutional because it 'sends a message to non-adherents that they are outsiders,' disapproval is unconstitutional because it 'sends the opposite message.' " *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) (quoting *Lynch v. Donnelly*, 465 U.S. 668 at 688 (1984) (O'Connor, J., concurring)) (emphasis in original).

The prohibition of all religious speech by students during their pre-game activities implies an unconstitutional disapproval of religion. As the Eleventh Circuit stated in *Chandler*, "'[c]leansing' our public schools of all religious expression . . . inevitably results in the 'establishment' of disbelief – atheism – as the State's religion. Since the Constitution requires neutrality, it cannot be the case that government may prefer disbelief over religion." *Chandler*, 180 F.3d at 1261.

In *Schempp*, Justice Goldberg warned that an:

> untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution demands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Schempp, 374 U.S. at 306 (Goldberg, J., concurring). "The discriminatory suppression of student-initiated religious speech demonstrates not neutrality but hostility toward religion. . . . " *Chandler*, 180 F.3d at 1261. For these reasons, this decision must be reversed.

II. THE FIFTH CIRCUIT'S DECISION IMPROPERLY FINDS THAT STUDENT SPEECH AUTOMATICALLY BEARS THE IMPRIMATUR OF THE GOVERNMENT AND THUS BECOMES STATE ACTION.

The Fifth Circuit may not constitutionally require school districts to forbid student speech. As stated by this court 30 years ago in *Tinker v. Des Moines*, "[i]t can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines*, 393 U.S. 503, 506 (1969). The Supreme Court has made it very clear that "[p]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). "There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (quoting *Edwards v. Aguillard*, 482 U.S. 226, 250 (1990)) (emphasis in original). The Establishment Clause does not ban prayer, it bans state prayer. The

prayer involved in this case is not state prayer, but private prayer.

It is true that government cannot control, dictate, direct or supervise prayer. That was the basis of the constitutional infirmity in both *Engel* and *Lee*. It is the element of governmental control or direction that *prayer* would occur that violates the Constitution. However, that element is lacking in this case. The school does not merely use students as a surrogate to accomplish state sponsored prayer, as in *Lee*. The policies here clearly give a student a limited public forum to begin or solemnize school activities in any manner deemed appropriate. The student then exercises his or her choice of message, whether secular or religious.

"Because genuinely student-initiated religious speech is private speech endorsing religion, it is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution." *Chandler*, 180 F.3d at 1261; *see also Mergens*, 496 U.S. at 250. The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S. at 673.

Quoting the court in *Chandler*:

> How, then, does a school accommodate religious expression without commanding it? . . . [T]he answer is simple – it is to be 'permitted.' Not required. Not commanded. Not even suggested. Simply permitted. . . . The first principle must always be that genuinely student-initiated religious speech must be *permitted*. A student's individual decision to pray or otherwise speak religiously is not the State's command. Such speech is fully protected.

Chandler, 180 F.3d at 1264 (citing *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 965 (5th Cir. 1992)). *See also Mergens*, 496 U.S. at 252.

This Honorable Court should find, as the Eleventh Circuit did in *Chandler*, that this student-initiated speech is not state action, but constitutionally protected private speech, and should be permitted.

III. REQUIRING A SCHOOL DISTRICT TO EDIT OR CENSOR STUDENT-INITIATED AND STUDENT-LED GRADUATION PRAYERS CONSTITUTES DISCRIMINATION BASED ON VIEWPOINT AND NECESSARILY FORCES DEEP ENTANGLEMENT IN PRIVATE RELIGIOUS SPEECH.

The Fifth Circuit's ruling on graduation prayer places a tremendous burden on school officials to determine what words in a graduation prayer are nonsectarian and nonproselytizing. This certainly forces officials into deep entanglement in violation of *Lee*. This requirement places the school in the position of reviewing and editing the graduation prayers to ensure that they are nonsectarian and nonproselytizing. Such a task would be unwieldy, unmanageable and excessively entangle school officials in religious issues. This would place officials in the same type of impermissible entanglement that was struck down in *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, a university policy required content-based exclusion of religious speech. This required university officials and

ultimately the courts to determine which words contained religious expression in a manner that would inevitably lead to entangle State with religion in an impermissible manner.

The same was true for regulation of speech in a student newspaper in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). This Court struck down the practice of requiring the university to scrutinize the content of the newspaper and interpret whether it contained religious content. The Fifth Circuit's decision, however, requires school officials to do what was forbidden officials in *Widmar* and *Rosenberger* – scrutinize the proposed speech and decide what is religious. This requires excessive entanglement and is constitutionally prohibited.

It also places the district officials at great legal peril. The slightest misstep can plunge a school district into divisive expensive litigation whichever way they choose. No better example exists than the case at bar. Litigation arose and culminated in the Fifth Circuit's decision when the school attempted to fashion an acceptable policy regarding prayer. When the school subsequently attempted to follow the Fifth Circuit's ruling and forbid prayer, a lawsuit was filed by a student who claims her right to freedom of speech and freedom of religion have been violated. As a result of the student's lawsuit, the school has been enjoined by a federal district court from disciplining the student who chose to pray, yet the school is compelled to follow the Fifth Circuit's ruling and not

permit her to pray.[3] She claims her right to Freedom of Speech has been violated. The school is caught in a "Catch 22."

CONCLUSION

For these reasons, *amici* respectfully request that the Court reverse the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

ROGER D. HEPWORTH
HENSLEE, FOWLER, HEPWORTH & SCHWARTZ, L.L.P.
800 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701
(512) 708-1804

Counsel of Record for Amici

[3] *Ward v. Santa Fe ISD*, Civil Action G-99-556, Southern District of Texas, Galveston Division (not reported).

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In the Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT, PETITIONER,

v.

JANE DOE, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE CHRISTIAN LEGAL SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MICHAEL W. MCCONNELL**
104 Law Building
332 South 1400 East Front
Salt Lake City, Utah 84112
(801) 581-6342

STEFFEN N. JOHNSON*
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

KIMBERLEE W. COLBY
Christian Legal Society
4208 Evergreen Lane
Annandale, Virginia 22003
(703) 642-1070

STEPHEN M. SHAPIRO
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

***Of Counsel* **Counsel of Record*

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether the Establishment Clause permits a public school district to allow student volunteers selected on the basis of secular and neutral criteria to deliver a message or invocation of their choice as part of the pre-game activities at high school football games.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Christian Legal Society ("CLS"), founded in 1961, is a nonprofit interdenominational association of more than 4,000 Christian attorneys, law students, law professors, and judges. CLS has chapters in nearly every State and at more than 140 accredited law schools.

Since 1975, CLS's legal advocacy and information arm, the Center for Law and Religious Freedom, has worked to protect the religious liberty of all individuals and organizations, both Christian and non-Christian, in courts across the Nation. Using a network of volunteer attorneys and law professors (along with its full-time staff), the Center provides accurate information to the public and political branches concerning the interaction of law and religion. Since 1980, the Center has filed *amicus* briefs in virtually every case before this Court involving church-state relations.

CLS has been particularly active in efforts to protect the rights of those who wish to engage in private religious expression on equal terms with other private speakers. CLS's staff was instrumental in drafting the Equal Access Act, 20 U.S.C. §§ 4071-4074, which this Court sustained in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990). See 128 CONG. REC. 11784-11785 (1982) (Sen. Hatfield). Similarly, CLS was a principal author of *Religion in the Public Schools: A Joint Statement of Current Law*, which served as the basis for the U.S. Department of Education's guidance letters on *Religious Expression in Public Schools*. For these reasons, CLS has a vital interest in the outcome of this case.

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This brief addresses one of the most difficult issues arising under the First Amendment: in what circumstances is speech that takes place in the context of a public event fairly attributable to the state? This question is vitally important to a coherent theory of the Religion Clauses. An overly broad view of *government* speech would impose the restraints of the Establishment Clause on private speakers—thus requiring the elimination of private religious voices from public life. An overly broad view of *private* speech would nullify constitutional restraints on the power of government—thus permitting the state to engage in religious activity. A proper resolution of cases such as this therefore requires recognition of the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion).

Two inquiries determine whether religious speech is attributable to the state. First, this Court asks whether the criteria by which speakers are selected are genuinely secular and neutral toward religion. Where the means of selecting speakers are "skewed toward religion" or tip the balance in favor of religious speech, they violate the principle that the state may not favor religion over nonreligion. Second, the Court asks whether the speakers retain control over their messages, and in particular the selection of religious content. When the state controls the content of a message, one may fairly say that the state itself is speaking. In contrast, when private speakers retain control over their remarks, the state cannot be said to have approved them—regardless of whether their content is religious.

We believe that the football policy here, on its face, satisfies these mandates. Nothing in the policy encourages

students to elect speakers on the basis of non-neutral criteria; there has been no showing that Petitioner (the "District") reviews student messages for religious content; and insofar as the students retain control over their statements, they are free to make either secular or religious remarks. Without more, this does not violate the Establishment Clause.

ARGUMENT

I. THE DISTINCTION BETWEEN STATE ACTION ADVANCING RELIGION AND PRIVATE ACTION ADVANCING RELIGION IS CRITICAL TO THE PROTECTION OF RELIGIOUS LIBERTY.

It is well settled that the provisions of the Constitution, with the exception of the Thirteenth Amendment, run solely against the state. The very language of the Fourteenth Amendment—"No State shall * * * deprive any person of life, liberty, or property, without due process of law"—by which the First Amendment is made applicable to the States, bespeaks its application to the government. In keeping with this language, this Court has always maintained, ever since the issue first arose in the *Civil Rights Cases*, 109 U.S. 3 (1883), that "'the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.'" *Blum* v. *Yaretsky*, 457 U.S. 991, 1002 (1982) (quoting *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948)). The Fourteenth Amendment "erects no shield against merely private conduct." *Shelley*, 334 U.S. at 13.

The distinction between private and governmental action (the "state action" doctrine) serves important constitutional purposes. Most important, it recognizes that constitutional norms that are liberty-enhancing when applied to the state may be liberty-infringing when applied to private parties. Just as imposing an obligation of content neutrality upon the state *enhances* the expressive liberty of private citizens,

Carey v. *Brown*, 447 U.S. 455 (1980), imposing such an obligation on private parties would *interfere* with such liberty, *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995). Likewise, while imposing a religious nondiscrimination requirement on the state *increases* religious freedom, *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993), imposing such a requirement on private religious organizations *diminishes* such freedom, *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987). Limitations that make sense when applied to the state—which possesses substantial coercive power over its citizens—would be highly disruptive if applied to private citizens or other organizations that lack such power.[2]

The distinction between state and private action is particularly important to a coherent view of the Religion Clauses:

> The very same conduct can be either constitutionally protected or constitutionally forbidden, depending on whether those who engage in it are acting in their "private" or their "public" capacities. If a group of people get together and form a church, that is the free exercise of religion. If the government gets together and forms a church, that is an establishment of religion. One is protected; one is forbidden. It is inconceivable that we could construct a theory of freedom of religion which does not distinguish at some level between the activities of the individual believer and the activities of the sovereign.

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[2] See also *Rust* v. *Sullivan*, 500 U.S. 173, 193-194 (1991) (where private parties are enlisted to convey the government's message, free speech guarantees do not apply); *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224-225 (1989) (applying political neutrality requirements to a political party would interfere with private advocacy).

Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. REV. 163, 184, 185.

We do not mean that there are no hard cases at the margins. Our point is simply that much is at stake whenever this Court draws a line between private and governmental religious activity, because the Constitution protects one and forbids the other. *E.g.*, *Mergens*, 496 U.S. at 250. Our primary aim in filing this brief is thus to propose reliable principles to guide this determination as it relates to religious speech at public events.

A. This Court's Decisions Confirm That The State Itself May Not Engage In Religious Exercise Or Advance Inherently Religious Messages.

This Court has long held that the Establishment Clause bars the state from engaging in religious exercise.[3] Some 50 years ago, the Court struck down a program granting clergy special access to public school students, to offer curricular "classes in religious instruction." See *McCollum* v. *Board of Educ.*, 333 U.S. 203, 207 (1948). Noting that the state may not "'pass laws which aid one religion, aid all religions, or prefer one religion over another,'" the Court held that this principle was violated by providing clergy the "invaluable aid" of preferential access to public school students. *Id.* at

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[3] In acknowledging that the state may not advance religious messages or engage in religious exercises, we mean those messages and exercises that are *inherently* religious. The Court has repeatedly made clear that "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." See *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961); see also *Harris* v. *McRae*, 448 U.S. 297, 319-320 (1980); *Bowen* v. *Kendrick*, 487 U.S. 589, 604 n.8, 613 (1988).

210, 212. As the Court later explained, *McCollum* is a case in which school officials "permitt[ed] school facilities to be used for instruction by religious groups, but *not* by others." *Widmar* v. *Vincent*, 454 U.S. 263, 272 n.10 (1981).

Similarly, in *Engel* v. *Vitale*, 370 U.S. 421, 423 (1962), the Court invalidated state laws "direct[ing] the use of prayer in public schools." The founders recognized that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services." *Id.* at 429. Applying this principle, the Court held that "neither the power nor the prestige" of the state may "be used to control, support or influence the kinds of prayer the American people can say." *Id.* at 429. The state is "without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." *Id.* at 430.

One year later, the Court addressed the validity of laws requiring public schools to begin the day with Bible readings and prayer. *School Dist.* v. *Schempp*, 374 U.S. 203, 205, 223 (1963). Again stating that "the Government [must] maintain strict neutrality, neither aiding nor opposing religion," the Court explained that "the concept of neutrality * * * does not permit a State to require a religious exercise." *Id.* at 225. The Court had no objection to "study of the Bible or of religion, when presented objectively as part of a secular program of education,"[4] but invalidated making "religious

[4] For a statement on appropriate use of the Bible for educational purposes, see *The Bible & Public Schools: A First Amendment Guide* (1999), which CLS co-authored, and which is endorsed by President Clinton and some twenty religious and civil liberties organizations. See www.freedomforum.org.

exercises" a part of "curricular activities" conducted "under the supervision and with the participation of teachers." *Id.* at 223, 225. Such activity was "state action," and therefore barred by the Establishment Clause. *Id.* at 205.

Most recently, in *Lee* v. *Weisman*, 505 U.S. 577 (1992), this Court addressed an establishment challenge to a district's practice of inviting clergymen to deliver invocations and benedictions at its middle school graduation ceremonies. In addition to the obligatory nature of such events, the Court explained that "[t]hese dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools." *Id.* at 586. The Court was especially troubled by the principal's involvement in deciding to include prayers in the ceremony, in selecting clergy to deliver them, and in directing their content. *Id.* at 586-590. In such circumstances, the prayers "bore the imprint of the State," and the "constitutional constraints applied to state action" required invalidating the practice. *Id.* at 590, 595.

The *Weisman* decision was careful, however, to distinguish between governmental prayer and prayer that is privately initiated. The "Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State," the Court stated, and it follows that "school officials [may not] assist in composing prayers as an incident to a formal exercise for their students." 505 U.S. at 590. "[T]hough the First Amendment does not allow the government to stifle praye[r]," "neither does it permit the government to undertake that task for itself." *Id.* at 589.

From *McCollum* to *Weisman*, this Court's decisions have consistently recognized that it is harmful to genuine religious exercise for the state to engage in religious activity. As

James Madison wrote in his *Memorial and Remonstrance Against Religious Assessments*:

> [E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy.

Quoted in Appendix to dissenting opinion of Rutledge, J., in *Everson* v. *Board of Educ.*, 330 U.S. 1, 63, 67-68 (1947).

One need look no further than *Weisman* for a case in point. To ensure that Rabbi Gutterman offered a prayer that was "[a]ppropriate" to a graduation ceremony, the principal provided him "with a pamphlet entitled 'Guidelines for Civic Occasions'"—which "recommend[ed] that public prayers at nonsectarian civic ceremonies be composed with 'inclusiveness and sensitivity'"—and "advised him the invocation and benediction should be nonsectarian." 505 U.S. at 581.

It is easy to see the corrupting influence of the state in these circumstances. Government officials' views on what is "proper" in prayer are understandably driven not by religious concerns but by civic and political concerns regarding the perceived sensibilities of those attending. What is inclusive today may be exclusionary tomorrow, and what one official deems tolerant or appropriate may strike another as offensive. No one should be asked (let alone required) to conform his prayer to the wishes of the governing authority. And religious citizens, no less than secular ones, should be

alarmed by governmental control over religious expression such as prayer.

The notion that the state may establish a "civic religion" is as much an affront to religious liberty as an outright preference for one sect over another. See *Weisman*, 505 U.S. at 590. Since the government is "without power" to declare which types of prayer are appropriate (*Engel*, 370 U.S. at 430), it is no less (and no more) of an establishment of religion for the state to direct performance of "nonsectarian" and "nonproselytizing" prayer than it would be for the state to direct performance of "exclusionary" and "offensive" prayer. If the state is speaking, it may not offer a prayer.

B. This Court's Decisions Also Confirm That The Establishment Clause Provides No Warrant For Interfering With Private Religious Speech.

While holding fast to the principle that the state may not itself engage in religious exercise or favor religious over secular speech, this Court's "precedent [also] establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995).

In its landmark decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the Court expressly rejected arguments that a public university could "discriminate against religious speech on the basis of its content," or provide such speech with "less protection than other types of expression." *Id.* at 267. The state's asserted interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution," the Court explained, "is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well." *Id.* at 276. Thus, the state may not deny religious students equal access to its

property because they seek to use the property "'for purposes of religious worship or religious teaching.'" *Id.* at 265.

In 1990, the Court turned away establishment challenges to the Equal Access Act, 20 U.S.C. §§ 4071-4074, which requires public secondary schools to grant religious noncurricular groups the same privileges that they grant to secular groups. *Mergens*, 496 U.S. at 247. Writing for a four-Justice plurality, Justice O'Connor rejected claims that recognizing a "Christian club" "would effectively incorporate religious activities into the school's official program" or "provide the club with an official platform to proselytize other students." *Id.* at 247-248 "The proposition that schools do not endorse everything they fail to censor is not complicated," the plurality stated, and "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Id.* at 250. "Although a school may not *itself* lead or direct a religious club," it continued, "a school that merely *permits* a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion." *Id.* at 252 (emphasis added). See also *id.* at 260-261 (Kennedy, J., concurring in part and in judgment).

In 1993, this Court unanimously held that "it discriminates on the basis of viewpoint"—and thus "violates the Free Speech Clause of the First Amendment"—"to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Lamb's Chapel* v. *Center Moriches Sch. Dist.*, 508 U.S. 384, 387, 393 (1993). There, state officials sought to keep a church from obtaining after-hours access to its schools "on the ground that to permit its property to be used for religious purposes would

be an establishment of religion forbidden by the First Amendment." *Id.* at 394. But given the "variety of private organizations" that used the school for comparable purposes, the Court held that mere "fears of an Establishment Clause violation" provided no warrant for discriminating against privately initiated religious speech. *Id.* at 395.

In 1995, the Court rejected a claim that the state "violates the Establishment Clause when, pursuant to a religiously neutral state policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government." *Pinette*, 515 U.S. at 757. Noting that "government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince," the Court again reaffirmed that "private expression" may not be curtailed to serve some purportedly "compelling interest in complying with the Establishment Clause" or "avoiding official endorsement of Christianity." *Id.* at 760, 761, 762.

Justice Scalia, writing for a four-Justice plurality, stated that the Establishment Clause "applies only to the words and acts of *government*. It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum." *Pinette*, 515 U.S. at 767. Writing for three concurring Justices, Justice O'Connor stated a similar view: the Establishment Clause is satisfied "where truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly." *Id.* at 775.[5]

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[5] The Court in *Pinette* commented that "[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on

Finally, on the same day that it decided *Pinette*, the Court held that the Establishment Clause does not permit "'a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious.'" *Rosenberger* v. *Rector of Univ. of Va.*, 515 U.S. 819, 837 (1995). There, school officials sought to deny funding to *Wide Awake*, a newspaper that addressed campus issues from a "Christian viewpoin[t]," claiming this was "excused by the necessity of complying with the Constitution's prohibition against state establishment of religion." *Id.* at 826, 837. Once again, the Court "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers." *Id.* at 839.

The Court agreed that the Establishment Clause applies where "the State is the speaker"—either because it "enlists private entities to convey its own message" or "determines

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speech." 515 U.S. at 761-762. As discussed in text (at 17), we believe this analysis misses the point: if speech that is *attributable to the state* advances religion, the Establishment Clause compels the state to stop; but if *private speakers* advance religion, the mandates of the Establishment Clause *are not even triggered*. Properly interpreted, therefore, there would never be a situation where the Establishment Clause requires one result and the Free Speech Clause requires another, forcing the Court to choose between the Clauses. See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 83-86 (1998); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 331 (1996). *Cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-8, at 1201 (2d ed. 1988) (in case of conflict, "the free exercise principle should be dominant [over] the anti-establishment principle").

[its] content." But "[i]t does not follow * * * that viewpoint-based restrictions are proper when the [state] does not itself speak or subsidize transmittal of a message it favors." *Rosenberger*, 515 U.S. at 833, 834. When the state allocates speech opportunities on the basis of "neutral criteria and evenhanded policies," "the guarantee of neutrality is respected, not offended." *Id.* at 839. Absent proof that it "created [such criteria] to advance religion or adopted some ingenious device with the purpose of aiding a religious cause," "[t]here is no Establishment Clause violation in [the State's] honoring its duties under the Free Speech Clause." *Id.* at 840, 846.

1. Use of public property or resources does not itself make private speech attributable to the state.

In none of these cases, from *Widmar* to *Rosenberger*, did this Court find an establishment because a speaker wished to express a religious message on public property or by using other public resources. The Court in *Mergens* held that religious students were entitled to equal "access to the school newspaper, bulletin boards," and "public address system" (496 U.S. at 247), and the Court in *Rosenberger* held that religious students were entitled to equal access to the campus "computer facility," "printer," and "copy machine." 515 U.S. at 843. To be sure, speech given at public events is less "private" than speech in homes or churches. But when "permission [is] requested through the same application process and on the same terms required of other private groups," the fact that "expression [is] made on government property" is of no moment. *Pinette*, 515 U.S. at 763; *id.* at 765-766 (plurality opinion).

If using state resources made a private speaker's message the state's, *all* of these cases would have come out the other way. *Widmar* and *Lamb's Chapel* involved use of public property for worship and/or religious teaching; *Mergens*

involved use of a public high school and its amenities for a Christian club; *Pinette* involved an unattended religious display near the very seat of government; and *Rosenberger* involved public funding of an evangelical newspaper. The court below thus erred in ruling that the policy here is invalid because it allows use of "government-owned appliances and equipment, on government-controlled property." Pet. App. A24. Student speech is protected whether it occurs "in the cafeteria," "on the campus," or "on the playing field." *Tinker* v. *Des Moines Sch. Dist.*, 393 U.S. 503, 512-513 (1969).

2. *Private religious speech may not be censored simply because it is "offensive" to those in attendance.*

It is also untenable to suggest that religious messages may be censored because they might be offensive to those in attendance. The Establishment Clause protects citizens from the offense of being "subjected to *state-sponsored* religious exercises." *Weisman*, 505 U.S. at 592 (emphasis added).[6] But privately initiated speech is another matter. As the Court held in *Tinker*, "[i]n order for * * * school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393

[6] Any claim that the policy here is invalid because it applies to football games rather than graduations (or vice versa) strikes us as unrelated to the purposes of the First Amendment. Private speech may not be censored solely on account of the sensitivity of the audience, which is likely to vary greatly from setting to setting. The important question is whether the government has given preference to religious speakers or enlisted otherwise private speakers to deliver its own religious message.

U.S. at 509. "People may take offense at all manner of religious as well as nonreligious messages," but "offense alone" does not violate the Establishment Clause. *Weisman*, 505 U.S. at 597.[7]

3. *If private religious speech were misattributed to the state, the proper remedy would be to require a neutral disclaimer, not to censor the speech.*

Even if the Court perceives an unreasonable risk that observers will wrongly attribute to the state speech that is privately initiated, the proper remedy is not to silence private speakers, but to make the state disclaim sponsorship of their messages. As the Seventh Circuit has observed:

> Public belief that the government is partial does not permit the government to become partial. * * * The school's proper response is to educate the audience rather than squelch the speaker. * * * Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the * * * schools can teach anything at all.

[7] See also *Street* v. *New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"); *Texas* v. *Johnson*, 491 U.S. 397, 409 (1989); *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *Gitlow* v. *New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). See also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-10, at 852 (2d ed. 1988) ("One must begin with the premise that government may not justify the suppression of speech because its content or mode of expression is offensive to some members of the audience").

Hedges v. *Wauconda Community Sch. Dist.*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993).

Here, for example, a court might require the District to place a written disclaimer in its game program, explaining how students are selected and stating that the District is not the sponsor of their pre-game messages. See *Pinette*, 515 U.S. at 782 (O'Connor, J., concurring in judgment) (a "reasonable observer * * * would certainly be able to read and understand an adequate disclaimer"); accord *id.* at 794 (Souter, J., concurring in judgment). Or the District might be asked to announce that speakers have been elected by their peers to deliver a message of their choice, which it does not endorse. Such disclaimers would notify "informed member[s] of the community" that the state is not responsible for what is said (*id.* at 781 (O'Connor, J., concurring in judgment)), while ensuring that restrictions on speech are the "most 'narrowly drawn'" means of achieving this objective. *Id.* at 793 (Souter, J., concurring in judgment).

We do not believe that disclaimers are constitutionally required where speakers are selected on a secular, neutral basis and retain control over their speech. Such speakers are not state actors, and the commands of the First Amendment run solely against the state. If the state wishes to disclaim private religious speech, however, it should disclaim secular speech as well. *Pinette*, 515 U.S. at 769 (plurality opinion) (state may not "discriminate against [private religious speech] by requiring religious speech alone to disclaim public sponsorship"); *id.* at 794 (Souter, J., concurring in judgment) (approving disclaimer of all "private speech" as "carrying no endorsement from the State"). The government "must treat religious speech by private speakers exactly like secular speech by private speakers." Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of*

Religious Speech by Private Speakers, 81 NW. U. L. REV. 1, 3 (1986).

C. Two Standards Govern Whether Religious Speech Is Attributable To The State: The Neutrality Of The State's Selection Criteria And The Degree Of State Control Over The Message.

The foregoing cases make two things clear: the state itself may not advance religious messages, but private religious messages are fully protected by the Free Speech and Free Exercise Clauses. This is not to say that the provisions of the First Amendment can ever be in "conflict."[8] Rather, both provisions serve to limit state influence on religious decisionmaking. Just as the state may not use its power to advance religious causes (or encourage private citizens to do so), neither may it discriminate against those who express religious messages on equal terms with other private speakers. The unifying principle is that the First Amendment's commands run solely *against the government and its agents*. The Court thus needs reliable means of determining whether speech given at public events falls on the governmental or private side of the equation.

A review of the two lines of decisions discussed above reveals that two principles explain how the Court determines whether to attribute religious speech in public settings to the

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[8] It is anachronistic to view the Free Exercise Clause as protecting religion from the government and the Establishment Clause as protecting the government from religion. See Esbeck, *supra* n.4, at 11-12, 82-84, 88. *Cf. Wallace* v. *Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring in judgment) (noting that the "common purpose" of the Free Exercise and Establishment Clauses "is to secure religious liberty").

state. If both principles are satisfied, the Establishment Clause has not been violated.[9]

1. The neutrality of the selection criteria

First, the Court has asked whether the state's means of selecting speakers is genuinely neutral toward religion. When speakers are chosen based on "evenhanded" and "neutral criteria" that do not "promote," "encourage," or otherwise "favor one speaker over another," *Rosenberger*, 515 U.S. at 828, 833, 839, courts may be confident that the state is not favoring religion. Over time, if not immediately, neutral criteria should result in expression representing "the whole spectrum of speech, whether it manifests a religious view, an antireligious view, or neither." *Id.* at 841.

In contrast, where the government's selection criteria are "skewed towards religion," *Witters* v. *Washington Dep't of Servs.*, 474 U.S. 481, 488 (1986), "subsidize transmittal of a message it favors," or amount to "some ingenious device with the purpose of aiding a religious cause," *Rosenberger*, 515 U.S. at 834, 840, such criteria violate the neutrality that animates both the Establishment and Free Speech Clauses.

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[9] We do not suggest that these principles apply in *every* context. There are times when the state may properly act to facilitate voluntary religious exercise either by removing a burden on such exercise or without imposing burdens on nonadherents. In the military context, for example, the state "regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities" (and perhaps chaplains), "military personnel would be unable to engage in the practice of their faiths." *Schempp*, 374 U.S. at 226 n.10. We therefore urge the Court not to rule in a manner that addresses these issues.

Requiring the government to select speakers on the basis of neutral criteria permits the courts to determine whether such criteria are a pretext or subterfuge designed to enable government to favor religious speech. Both the plurality and concurring opinions in *Pinette* expressed concern over the prospect that terms of access to a public arena might not be *genuinely* neutral. Justice Scalia noted that "one can conceive of a case in which a governmental entity manipulates its administration of a public forum * * * in such a manner that only certain religious groups take advantage of it." 515 U.S. at 766 (plurality opinion).[10] Likewise, Justice O'Connor stated that the Establishment Clause is implicated by "preferential" treatment of religious expression, and that courts must take care to prevent "government manipulation of the forum." *Id.* at 776 (concurring opinion).

In light of these concerns, the *Weisman* Court held that when a public school "principa[l] decided that an invocation and a benediction should be given" at its middle school graduation, and "chose the religious participant" to deliver them, those choices were fairly "attributable to the State." 505 U.S. at 587. Rabbi Gutterman was chosen not on an evenhanded basis, but *precisely because* he would deliver a prayer. This is hardly neutral. Where the state "enlists private [persons] to convey its own message," it is as though "the State is the speaker." *Rosenberger*, 515 U.S. at 833.

On the other hand, secular criteria do not favor religion if the state is merely *aware* that religious speech may result from its policy. That would require state policymakers to

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[10] See also 515 U.S. at 766 (holding that "giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination)").

adopt criteria designed *not* to result in religious speech. Moreover, "[e]ven if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate [a statute], because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." *Mergens*, 496 U.S. at 249 (plurality opinion). If a policy reveals "a plausible secular purpose," "courts should generally defer to that stated intent." *Jaffree*, 472 U.S. at 74-75 (O'Connor, J., concurring in judgment).[11]

2. The degree of state control over the message

In addition to requiring the state to select speakers based on neutral criteria, this Court has examined the degree of state control over their speech. Where a government official "determines the content" of speech, or substantially "regulate[s] the content of what is or is not expressed," such expression is attributable to the state. *Rosenberger*, 515 U.S. at 833. In such a case, the problem is that the state has put its thumb on the scales to tilt otherwise private speech in a religious direction—which both places the state's imprimatur on the views expressed and interferes with the speaker's free speech rights. "[N]either the power nor the prestige" of the state may "be used *to control, support or influence* the kinds of prayer the American people can say." *Engel*, 370 U.S. at 429 (emphasis added).[12]

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[11] See also *Edwards* v. *Aguillard*, 482 U.S. 578, 615-616 (1987) (Scalia, J., dissenting); *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment).

[12] In other state action contexts, the Court asks whether the state has compelled an activity or provided "significant encouragement" to act in a certain manner, so as to warrant the conclusion that the state is responsible for the resultant activity. *Blum*, 457 U.S. at 1004. A neutrality inquiry under the Free Speech and Establishment Clauses, however, "requires an equal protection mode of analysis." *Walz* v. *Tax Commission*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). Thus, it is appropriate that the Court ask not only whether the state has *compelled* religious activity, but whether it has intentionally favored private religious expression over private secular expression.

Weisman illustrates the use of state power to bend speech in a particular religious direction. As noted above (at 8), the school principal both decided to have prayers at graduation and hand picked a clergyman to deliver them. But "[t]he State's role did not end with the decision to include a prayer and with the choice of a clergyman." 505 U.S. at 588. The principal also provided Rabbi Gutterman with "a pamphlet entitled 'Guidelines for Civic Occasions,'" and advised him that an "[a]ppropriate" prayer "should be nonsectarian." *Id.* at 581. Thus, even if Rabbi Gutterman had been selected based on neutral criteria, the principal's decision to "direc[t] and contro[l] the content of the prayers" still rendered them "attributable to the State." *Id.* at 587, 588. As the Court noted in *Engel*, the state "is without power to prescribe by law any particular form of prayer which is to be used as an official prayer," and "the fact that the prayer may be denominationally neutral" is irrelevant. 370 U.S. at 430.

II. POLICIES THAT PERMIT SPEAKERS SELECTED ON A NEUTRAL BASIS TO DELIVER A MESSAGE OF THEIR CHOICE AT PUBLIC EVENTS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

As we have shown, *Weisman* rightly invalidated a school district's practice of inviting hand-picked clergy to deliver what it deemed an "appropriate" prayer at its graduation ceremonies. The district's criteria for selecting the speaker

were decidedly non-neutral, and the state virtually dictated the content of the message. It is no exaggeration to say that Rabbi Gutterman was enlisted to deliver a state message.

This is not to say, however, that religious speech offered at public events is necessarily unconstitutional. Where private speakers are selected on a genuinely neutral basis and retain control over their remarks, principles of *both* free speech and nonestablishment require the state not to meddle with their messages. As Justice Souter observed in *Weisman*, a different case would have been presented "[i]f the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message." 505 U.S. at 630 n.8 (concurring opinion). In those circumstances, one cannot reasonably infer "that the government brought prayer into the ceremony 'precisely because some people want a symbolic affirmation that government approves and endorses their religion.'" *Id.* at 630.

For example, if a school principal regularly invited the student valedictorian to deliver a message of her choice at graduation, it would not violate the Establishment Clause if she prayed or made religious remarks. Academic standing is a secular basis for choosing a speaker, and the state is exercising no influence on her message. Thus, the Ninth Circuit properly sustained a policy permitting students chosen on academic grounds to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement" at their graduation. *Doe* v. *Madison Sch. Dist.*, 147 F.3d 832 (9th Cir. 1998), vacated as moot, 177 F.3d 789 (1999). Since each speaker "decide[d] individually the content of her pronouncement," and school administrators

did not "censor any presentation or require any content," any religious speech was not attributable to the state. *Id.* at 834.[13]

By the same token, the Third and Ninth Circuits have properly invalidated policies authorizing students to vote on whether to have prayer at graduation. *ACLU* v. *Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (en banc); *Harris* v. *Joint Sch. Dist.*, 41 F.3d 447 (9th Cir. 1994), vacated as moot, 515 U.S. 1154 (1995). Holding a vote on whether to have a prayer is *not* neutral—there will be *prayer* or there will be *no speech at all*. See *Chandler* v. *James*, 180 F.3d 1254, 1259 (11th Cir. 1999) (distinguishing a policy treating secular and religious speech alike from one "which 'permits' private parties to speak, but then limits their speech to prayer or other devotional speech"), pet'n for cert. filed (Dec. 2, 1999) (No. 99-935). By definition, speakers are not free to direct their remarks, and such a practice merely delegates to the student body a decision the state itself may not lawfully make. See *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 448 (1985); *cf. Engel*, 370 U.S. at 429 ("the ballot box" does not excuse an establishment); accord *Weisman*, 505 U.S. at 596; *Schempp*, 374 U.S. at 225-226.

By contrast, the Fifth Circuit erroneously sustained a policy permitting students to vote to have a "nonsectarian, nonproselytizing prayer" at graduation. *Jones* v. *Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992). Such policies are doubly invalid: in limiting the vote to whether to have *prayer*, the state favors religious speech; and in requiring prayer to meet "inclusiveness" standards, the state

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[13] For similar reasons, we believe *Guidry* v. *Broussard*, 897 F.2d 181 (5th Cir. 1990), which upheld a school district's decision to censor a valedictorian's religious graduation speech, was wrongly decided.

controls its content. A view of the Establishment Clause that "require[s] the [state], in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question—speech otherwise protected by the Constitution—contain too great a religious content," "raises the specter of governmental censorship, to ensure that all student [statements] meet some baseline standard of secular orthodoxy." *Rosenberger*, 515 U.S. at 844. "[O]fficial censorship" is "far more inconsistent with the Establishment Clause's dictates than [is] governmental [authorization] of [student messages] on a religion-blind basis." *Id.* at 845.

As discussed below (at 28), however, the Fifth Circuit erred in holding that the District's football policy here was "essentially identical" (Pet. App. A10) to its graduation policy. The football policy permits a vote on whether to have a message *or* invocation, and it appears to let students control what they say. Students are as free to use their time to extol the virtues of the late Walter Payton as a great sportsman as to pray for the players' safety. They may suggest a moment of silence out of respect for the students who recently lost their lives at Texas A&M, or they may talk about the value of teamwork. Any religious remarks are not attributable to the state in these circumstances.

Finally, we would note that nothing in the Establishment Clause stands in the way of high school football players who wish to join together and pray, on their own initiative, prior to or after a game. We are not suggesting that public school football coaches may lead such prayers. See *Doe* v. *Duncanville Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995). But just as Reggie White or Cris Carter might gather after the buzzer to give thanks to God for the chance to play, so may students at a public high school. The fact that such prayers take place on a public playing field does not render them attributable to the state, and the Fifth Circuit plainly erred in holding that

the government is responsible for "spontaneously initiated" prayers simply because "school officials are present and have the authority to stop [them]." Pet. App. A38.

III. THE DISTRICT'S POLICY FACIALLY SATISFIES THE REQUIREMENTS OF NEUTRAL SELECTION CRITERIA AND PRIVATE CONTROL OVER CONTENT.

Prior to this lawsuit, the District had "no written policy" on statements at football games. Pet. App. A6. In response to a district court order, it promulgated a policy "to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games." *Id.* at F1. The policy's stated purposes are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." *Ibid.* To this end, "the high school student council shall conduct an election, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation." *Ibid.* "The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy." *Ibid.*[14]

The Fifth Circuit invalidated this policy on its face, based on a *per se* rule that "[t]he prayers are to be delivered at *football games*—hardly the sober type of annual event that

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[14] This differs from the policy approved in *Jones* v. *Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), which requires that graduation prayers be "nonsectarian" and "nonproselytizing." The District adopted a *Jones* policy as a fallback, which takes effect if a court enjoins its primary policy. App. F1-F2.

can be appropriately solemnized with prayer." Pet. App. A38. Apart from the "singularly serious nature of a graduation ceremony," the court could conceive of no "'event that could appropriately be marked with a prayer.'" *Id.* at A37, A38. According to the court of appeals, the policy was invalid because *any* "[p]rayers that a school 'merely' permits will still be delivered to a government-organized audience, by means of government-owned appliances and equipment, on government-controlled property, at a government-sponsored event, thereby clearly raising substantial Establishment Clause concerns." *Id.* at A24.

Contrary to the reasoning of the Fifth Circuit, the fact that students might deliver a prayer over a "public address system" does not make this a difficult case. *Mergens*, 496 U.S. at 247. Nor is it the least bit troubling that this case involves football games rather than graduation ceremonies. What matters is whether speakers are selected on a neutral basis and retain control over their remarks. On its face, the District's policy satisfies these requirements. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) (plaintiff must show that "no set of circumstances exists under which the [policy] would be valid").

A. Holding An Election Is A Facially Neutral Means Of Selecting A Speaker.

Holding a student election to determine who will deliver a message or invocation at District football games is, on its face, a neutral means of selecting a speaker. The policy does not prescribe factors that students should consider in voting, and any student may run for election to speak. Students are free to cast their votes for any number of reasons—including popularity, public speaking ability, and athleticism. Such criteria are more subjective than selecting speakers based on factors such as their grades. But it would be improper, in analyzing a facial challenge, to speculate that primarily non-

neutral factors would motivate student voting. *Cf. Jaffree*, 472 U.S. at 74 (O'Connor, J., concurring in judgment) (stating that "a court has no license to psychoanalyze the legislators"). Insofar as the policy allows students to vote for neutral reasons, it must be upheld on its face.

One can conceive of circumstances where an election is nothing more than a pretext for a vote on having prayer. But the Establishment Clause does not erect a bar preventing students from voting on a speaker for a school event simply because the speaker might make religious remarks. If, based on neutral criteria (*e.g.*, public reputation), the students voted to invite the Reverend Jesse Jackson to deliver a pre-game address, it would not violate the Establishment Clause if his message had openly religious themes. See David Heinzmann, *Jackson Warns Youths to Avoid Violence*, CHI. TRIB., Nov. 24, 1999, at 1. Nor would it be unconstitutional if the students, again based on neutral criteria (*e.g.*, popularity or athleticism), voted to invite the captain of the football team to make a statement, and he chose to deliver a prayer. The decisive point is that speakers are selected on a neutral basis, and there is no evidence on this record that the policy—adopted during the course of this litigation—has been implemented so as to violate this standard.[15]

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[15] Whether the policy is constitutional on an "as applied" basis is a separate question, and the record in this case, as it now stands, provides no basis for evaluating it. We would note, however, that the District's former practice of inviting the "student council chaplain" to pray before games (Stip., ¶ 123) is not, standing alone, dispositive of whether its *current* policy is constitutional. If it were, no government body could ever correct an unconstitutional practice. In addition, in any "as applied" challenge, the burden would be on *the plaintiffs* to prove that the election was intended by the authorities (or understood by the students) as tantamount to a referendum on prayer rather than, as it appears on its face to be, a neutrally structured opportunity for speech.

B. The District's Policy Facially Satisfies The Requirement Of Private Control Over Content.

The District's policy also facially satisfies the requirement of private control over content. As noted above, the policy permits student speakers to "decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy." Pet. App. F1. Students may recite a poem on school spirit, or they may remind the players that "It doesn't matter whether you win or lose; it's how you play the game." They may denounce taunting and cheating, or they may note the importance of respecting one's opponent. They may discuss the value of physical fitness to a well-rounded education, or they may encourage the players to shake hands after the game. Over time, it is reasonable to expect that the policy will result in messages representing the "whole spectrum" of student views—some "religious," some "antireligious," and some that are "neither." *Rosenberger*, 515 U.S. at 841.[16] That prayer is one option does not mean the District has violated the Establishment Clause.[17]

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[16] In *Adler* v. *Duval County School Board*, 851 F. Supp. 446, 453 n.9 (M.D. Fla. 1994), vacated as moot, 112 F.3d 1475 (11th Cir. 1997), for example, the court reported that during the year after *Weisman* was decided, a school district's policy permitting students to vote on whether to have a student "message" at their graduation resulted in both secular and religious messages.

[17] We acknowledge that the District's policy could be applied so as to authorize District officials to judge whether student remarks are "appropriate" to "solemnize the event." Pet App. F1. For example, if the District were to pre-screen religious content to ensure that it met this standard, this would raise constitutional concerns under the Free Speech *and* Establishment Clauses. See pp. 20-21, *supra*. Here again, however, there is no evidence in this record that the policy has been applied to interfere with student control of religious content.

We believe that it would improve the policy to omit the term "invocation." Yet this may be read as nothing more than a clarification that both types of speech, secular and religious, are allowed. Moreover, the District deliberately broadened its policy *beyond* that required by governing Fifth Circuit precedent—to permit messages *or* invocations. Insofar as the Court is concerned that the policy have a secular purpose, it thus appears to be a good faith effort to ensure that religious and secular speech are treated evenhandedly. *Cf. Mergens*, 496 U.S. at 249 (plurality opinion) ("Congress' avowed purpose—to prevent discrimination against religious and other types of speech—is undeniably secular.").[18]

The fact that only one student speaks at each game does not make the chosen speaker a state actor. *Cf. Mergens*, 496 U.S. at 236 (Equal Access Act is triggered "even if a public secondary school allows only one 'noncurriculum related student group' to meet"). That there is a limited opportunity for speech *does* make it more important that the state "ration or allocate the scarce resources on some acceptable neutral principle." *Rosenberger*, 515 U.S. at 835. But the state has an obligation to be neutral in either event, and the "premise that the [state] could discriminate based on viewpoint if demand for [time to speak] exceeded its availability is wrong." *Ibid*. Just as "government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity" of space or money, neither can it justify unequal treatment because of scarcity of time. *Ibid*.

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[18] The policy further serves "the legitimate secular purpos[e] of solemnizing public occasions." *Lynch* v. *Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring); see *Jaffree*, 472 U.S. at 75, 78 n.5 (O'Connor, J., concurring in judgment).

C. If There Is No Reading Of The District's Policy Under Which Permitted Speech Is "Student-Initiated" And "Student-Led," The Court Should Dismiss The Writ As Improvidently Granted.

Finally, if the Court finds that there is *no* reading of the District's policy under which permitted speech is genuinely "student-led" and "student-initiated," it should dismiss the writ as improvidently granted. The Court dismisses a petition as improvidently granted where "[a]n important issue [is] found not to be presented by the record," or where "the record may not be 'sufficiently clear and specific to permit decision of the important constitutional questions involved in th[e] case.'" ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 259 (7th ed. 1993) (citing authorities).

In its order granting the petition for certiorari, the Court reformulated the question presented as follows: "Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause." It can only resolve this question if speech under the policy is truly "student-led" and "student-initiated." Thus, if the Court finds that there is no reading of the policy under which this is true—*i.e.*, if the state initiates or directs all speech under the policy—then "the basis upon which review was permitted is in fact nonexistent." STERN, *supra*, at 258. In such circumstances, the proper remedy is to dismiss the writ as improvidently granted.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the policy upheld on its face. Alternatively, the writ should be dismissed as improvidently granted.

Respectfully submitted.

MICHAEL W. MCCONNELL**
104 Law Building
332 South 1400 East Front
Salt Lake City, Utah 84112
(801) 581-6342

STEFFEN N. JOHNSON*
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

KIMBERLEE W. COLBY
Christian Legal Society
4208 Evergreen Lane
Annandale, Virginia 22003
(703) 642-1070

STEPHEN M. SHAPIRO
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

***Of Counsel*

**Counsel of Record*

Counsel for Amicus Curiae

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In the Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

JANE DOE, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF ON THE MERITS OF *AMICI CURIAE* STATE OF TEXAS, ATTORNEY GENERAL OF TEXAS JOHN CORNYN, GOVERNOR OF TEXAS GEORGE W. BUSH, STATES OF ALABAMA, KANSAS, LOUISIANA, MISSISSIPPI, NEBRASKA, SOUTH CAROLINA, AND TENNESSEE IN SUPPORT OF PETITIONER

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Atty General

LINDA S. EADS
Deputy Attorney General
for Litigation

GREGORY S. COLEMAN
Solicitor General

JULIE CARUTHERS PARSLEY
Deputy Solicitor General
Counsel of Record

MEREDITH B. PARENTI
Assistant Solicitor General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1896

COUNSEL FOR *AMICI*

350

JOHN CORNYN
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711

GEORGE W. BUSH
Governor of Texas
P.O. Box 12428
Austin, TX 78711

BILL PRYOR
Attorney General of
Alabama
Alabama State House
11 South Union Street
Montgomery, AL 36130

CARLA J. STOVALL
Attorney General of Kansas
120 S.W. 10th Avenue
Topeka, KS 66612-1597

RICHARD P. IEYOUB
Attorney General of
Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

MIKE MOORE
Attorney General of
Mississippi
P.O. Box 220
Jackson, MS 39205

DON STENBERG
Attorney General of
Nebraska
Department of Justice
2115 State Capitol
Lincoln, NE 68509

CHARLES M. CONDON
Attorney General of
South Carolina
P.O. Box 11549
Columbia, SC 29201

PAUL G. SUMMERS
Attorney General and
Reporter of Tennessee
423 Fifth Avenue North
Nashville, TN 37243

QUESTION PRESENTED

Whether Petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

This case presents the question of whether a public school district's policy that permits, but does not require, student-led, student-initiated prayer at football games violates the Establishment Clause. For the reasons that follow, *amici* believe that this facially neutral policy is constitutional, and urge the Court to reverse the Fifth Circuit's judgment to the contrary.

INTEREST OF *AMICI*

The State of Texas, Texas Attorney General John Cornyn, Texas Governor George W. Bush, and the States of Alabama, Kansas, Louisiana, Mississippi, Nebraska, South Carolina and Tennessee appear as *amici curiae* and urge the Court to reverse the judgment of the Fifth Circuit.[1] *Amici* have an interest in this case because the Fifth Circuit's decision will impose liability on states and other governmental entities for Establishment Clause violations despite the lack of any impermissible state action. The court of appeals implicitly found that students who engage in religious speech at school-sponsored events—without official sanction or oversight—become state actors who can violate the Establishment Clause with their remarks. Under this novel and unprecedented standard, whenever the state opens a forum for speech, whether by students or others, it will be in danger of attracting lawsuits based on the speech of private individuals. The Fifth Circuit's decision will have far-reaching implications on religious and other speech beyond the context of high school football games. Because officials cannot constitutionally censor student remarks to excise religious content, they will be forced to limit or close entirely existing forums for student speech. Ultimately, this could negatively impact other forums for public speech outside the school context, to the detriment of public discourse in America.

1. As required by SUP. CT. R. 37.6, *amici* state that this brief was not authored in whole or in part by any party to this action, and no person or entity made a monetary contribution for the preparation or submission of this brief.

The parties have given their consent to the filing of this brief, as shown in the blanket letter of consent filed by the parties with this Court on December 22, 1999. *See* SUP. CT. R. 37.2(a).

SUMMARY OF THE ARGUMENT

In two short, dismissive paragraphs, the Fifth Circuit held that Santa Fe Independent School District's student message policy for school football games violated the Establishment Clause of the First Amendment. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 823 (CA5 1999), *cert. granted*, 120 S.Ct. 494 (1999) (No. 99-62) (hereinafter "*Santa Fe I.S.D.*"). The court failed to explain why the football policy was unconstitutional, except to derisively state that football is "hardly the sober type of annual event that can be appropriately solemnized with prayer." *Id.* The Fifth Circuit opined that a school prayer policy could not survive outside the "nurturing context" of a graduation ceremony, and therefore the school district's football policy could not withstand scrutiny, regardless of whether the court imposed the nonsectarian, nonproselytizing content requirements it had imposed on the district's graduation policy.[2] *Id.*

Most tellingly, however, the court failed to identify any state action that would violate the First Amendment's proscription against establishing a religion. Although the Santa Fe policy is facially neutral and allows students—not school officials—"to deliver a brief invocation and/or

2. Because the Court did not grant the writ to address the graduation policy, this brief will address it only in so far as the Fifth Circuit's reasoning illuminates its rather abbreviated discussion of the football policy.

message" without official sanction or oversight, the court glossed over the fundamental requirement of state action in finding an Establishment Clause violation.

The Fifth Circuit's blanket prohibition on student-led, student-initiated religious speech at school football games, and indeed at any event outside the graduation context, would force school officials to engage in unconstitutional viewpoint discrimination by censoring only religious speech. This violates the Court's repeated admonitions that, above all, the state must be neutral towards religion. The Fifth Circuit's judgment must be reversed.

The Court should also address the Fifth Circuit's requirement that any student religious speech must be nonsectarian and nonproselytizing. The Fifth Circuit assumed that this content-based requirement would apply to the football policy, and it will still stand if the Court reverses the judgment below. The Court has never limited constitutional protection to only nonsectarian and nonproselytizing religious speech, and to do so will result in viewpoint discrimination in violation of the First Amendment.

ARGUMENT

I. A STUDENT-LED, STUDENT-INITIATED RELIGIOUS MESSAGE CANNOT "ESTABLISH" RELIGION BECAUSE THERE IS NO IMPERMISSIBLE STATE ACTION.

A. School Officials Do Not Initiate or Direct the Content of Student Messages Under Santa Fe's Policy.

By definition, state action is the determining factor in evaluating a possible Establishment Clause violation.[3] Before a violation can be found, then, impermissible state action must exist. Because students, not school officials, initiate and deliver any message under Santa Fe's student-message policy, there can be no impermissible state action, and thus no Establishment Clause violation.

The First Amendment states that "Congress shall make no law respecting an establishment of religion," U.S. CONST. amend. I, and the Court has applied the Establishment Clause to the states through the Fourteenth Amendment Due Process Clause. *Everson v. Board of Educ.*, 330 U.S. 1, 14-15, 67 S.Ct. 504, 511 (1947). "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally

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3. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Educ.*, 330 U.S. 1, 15, 67 S.Ct. 504, 511 (1947). "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n*, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411 (1970).

established religion or governmental interference with religion." *Walz v. Tax Comm'n*, 397 U.S. 664, 669, 90 S.Ct. 1409, 1411-12 (1970). The Court has recognized "a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372 (1990) (plurality). Private individuals who are not acting as surrogates of the state are not state actors, and thus cannot violate the Establishment Clause. *See Chandler v. James*, 180 F.3d 1254, 1261 (CA11 1999), *petition for cert. filed*, 68 U.S.L.W. 3391 (U.S. Dec. 2, 1999) (No. 99-935); *see also San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 546, 107 S.Ct. 2971, 2986 (1987) (citations omitted); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 767, 115 S.Ct. 2440, 2449 (1995) (plurality).

The Court has consistently recognized that a government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]."[4] *San Francisco Arts & Athletics, Inc.*, 483

4. Outside the First Amendment context, the Court has applied a two-part test to determine whether the deprivation of a federal right is "fairly attributable" to the state. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753 (1982). "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.* "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* at 937, 102 S.Ct. at 2754. Focusing on the state actor prong, as discussed *infra*, it is clear that student speakers are not state actors

U.S. at 545, 107 S.Ct. at 2986; *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2786 (1982). That cannot be said of the Santa Fe policy, which allows only student-led, student-initiated speech, without official coercion or encouragement. Mere acquiescence in the actions of private individuals is not sufficient to create state action. *Blum*, 457 U.S. at 1004-05, 102 S.Ct. at 2785-86.

The Court's state-action requirement recognizes that "most rights secured by the Constitution are protected only against infringement by governments." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936, 102 S.Ct. 2744, 2753 (1982) (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156, 98 S.Ct. 1729, 1733 (1978)). "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.*

The Court recognized the necessity of state action in *Lee v. Weisman*, when it held that the Constitution was violated because the religious speech was controlled and directed by the school: a *school official* determined that a prayer should be given, a *school official* chose the religious speaker, a *school official* asked that speaker to provide a prayer, and a *school official* directed and controlled the content of that prayer. 505 U.S. 577, 586-87, 112 S.Ct. 2649, 2655-56 (1992).

under Santa Fe's facially neutral policy.

The holding in *Lee* is surprisingly simple: the Constitution is violated when "[s]tate officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools." *Id.* at 586, 112 S.Ct. at 2655.

Applying this precedent, it is clear that there is no state action here. The relevant actors are student speakers with no actual or apparent state authority. No school official directs the performance of any formal religious exercise. There is no official sanction for the speech, nor is there any endorsement. School officials have not "exercised coercive power or . . . provided such significant encouragement, either overt or covert," that student speech prior to football games must be deemed to be that of the school district. *See Blum*, 457 U.S. at 1004, 102 S.Ct. at 2786. There is no "joint participation" by school officials in the student speech. *See Lugar*, 457 U.S. at 941, 102 S.Ct. at 2756 (holding that private party's joint participation with state officials in seizure of property was state action for purposes of Fourteenth Amendment). Nor are students, by giving a message prior to football games, performing a function that has been "traditionally the exclusive prerogative" of the school district. *See San Francisco Arts & Athletics, Inc.*, 483 U.S. at 544, 107 S.Ct. at 2985 (holding that U.S. Olympic Committee was not a state actor). At most, the school district tolerates and permits student-led and student-initiated speech.[5]

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5. This is not at all like the peremptory challenges exercised by private parties addressed in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620-25, 111 S.Ct. 2077, 2083-85 (1991), where a party's discriminatory strike of a prospective juror was not possible without "the overt, significant participation of the government," *id.* at 622, 111 S.Ct. at 2084. With peremptory challenges, the judge exercises substantial control over *voir dire*, oversees the exclusion of jurors, and advises a juror that he has been stricken. *Id.* at 623, 111 S.Ct. at 2084. Here, a student takes up a microphone only after an explicitly student-initiated election process and chooses his own words without official coercion, supervision, or control.

The students here cannot fairly be said to be state actors and impermissible state action is entirely missing from this case. The fact that student prayer may occur at a school-sponsored event does not immediately render the speech unconstitutional.[6] As long as the speech is private and not attributable to the state, there is no state action that violates the Establishment Clause. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841, 115 S.Ct. 2510, 2522-23 (1995).

As a fundamental proposition, Santa Fe's football policy does not violate the First Amendment because it implicates no improper state action. Yet the Fifth Circuit found a violation of the Establishment Clause. Necessarily, then, the court reached the novel conclusion that students are transformed into state actors when they speak at school events.

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6. Indeed, the policy does not even require a prayer at all, but allows students to determine what message or invocation, if any, to deliver. The term "message" is unquestionably neutral, and the dictionary definition of "invocation" does not require an interpretation grounded in religion. *See* 168 F.3d at 831 (Jolly, J., dissenting); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 637 (1983) (defining "invocation" to include "the act or process of petitioning for help or support . . . a calling upon for authority or justification . . . a formula for conjuring: INCANTATION . . . [and] and act of legal or moral implementation: ENFORCEMENT."

B. The Fifth Circuit Incorrectly Assumed that Students Are Transformed into State Actors when Speaking at School Events.

Although the Fifth Circuit did not directly address state action in its short discussion of the football policy, it stated earlier—without any explanation—that student-led graduation prayers "do not constitute private speech."[7] 168 F.3d at 821-22, n.12.

The remarkable conclusion that students are somehow transformed into state actors when speaking at school-sponsored events conflicts with the recent Eleventh Circuit case of *Chandler v. James*, 180 F.3d 1254 (CA11 1999), *petition for cert. filed*, 68 U.S.L.W. 3391 (U.S. Dec. 2, 1999) (No. 99-935).[8] The *Chandler* court correctly noted that to satisfy the scrutiny of the First Amendment, school officials must remain neutral and play no role in the student's speech—the fact that the speech is permitted, standing alone, does not run afoul of the First Amendment. Unless the school is using the student as a "surrogate" or is commanding the speech, there is no state action. "Religious speech by students does not become forbidden 'state action' the moment the students walk through the schoolhouse door." *Id.* at 1261-62.

7. Although the Fifth Circuit did not explain its novel reasoning, the Eleventh Circuit attempted to do so in a now-vacated opinion that addressed a similar student-message policy. *See Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1246-47 (1999), *reh'g en banc granted and opinion vacated*, 1999 WL 354889 (CA11 June 3, 1999). In *Adler*, the court found that students elected to give a brief "message" at graduation ceremonies were state actors because the school had "delegated" a portion of the graduation ceremony to them. *Id.* The court improperly relied on *Evans v. Newton*, 382 U.S. 296, 299, 86 S.Ct. 486, 488 (1966), for the proposition that when a state delegates governmental functions to private individuals, those individuals must be subject to constitutional limits. *Evans* dealt with a city that became a trustee of a park under a will providing that it be used for white people only. *Id.* at 297, 86 S.Ct. at 487. Private individuals were later appointed as trustees. Delegating governmental functions to private individuals cannot be equated with providing a neutral, student-message policy, however, and *Evans* is inapposite. And, as discussed *infra*, there is no other delegation of state functions to student speakers under Santa Fe's football policy.

As the *Chandler* court recognized, the lack of a state actor wholly defeats a First Amendment claim. *See id.* at 1261-62, 1265. How can an individual student's choice of topics and words, selected without any official oversight, be attributable to the state? If that is so, then virtually any words uttered at a school podium or microphone—whether by students or non-students—will be attributable to the school and subject it to unforeseen liability. A person does not become a state actor simply because he ascends a school podium.

The Court considered whether an Establishment Clause violation could exist in the absence of government action in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 115 S.Ct. 2440 (1995). Petitioners opposed the erection of a Ku Klux Klan cross on a state-owned plaza, and argued that the state could constitutionally apply a content-based restriction on private expression because an observer might mistake the expression for officially endorsed religious expression. *Id.* at 763, 115 S.Ct. at 2447. Although a majority of the Court held that the state's denial of the Klan's

8. The Eleventh Circuit rendered the *Chandler* decision shortly after it vacated *Adler* and took it *en banc*.

application for a permit to display the cross violated the First Amendment, they disagreed over whether a bystander's perception that private speech was actually public was enough to constitute an Establishment Clause violation. Justices Scalia, Kennedy, Thomas, and Chief Justice Rehnquist rejected the idea that the government could "endorse" private religious speech when it had not fostered or encouraged the speech, simply because an uninformed observer mistook it for government speech. *Id.* at 763-70, 115 S.Ct. at 2447-2450. The plurality found that a test that "would attribute to a neutrally behaving government private religious expression, has no antecedent in our jurisprudence, and would better be called a 'transferred endorsement' test." *Id.* at 764, 115 S.Ct. at 2447-48. "By its terms [the Establishment] Clause applies only to words and acts of government. It was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum." *Id.* at 767, 115 S.Ct. at 2449.

Justice O'Connor, joined by Justices Souter and Breyer, concurred in the judgment, but advocated using an "endorsement test" that would apply "even where a neutral state policy toward private religious speech in a public forum is at issue." *Id.* at 772, 115 S.Ct. at 2451 (O'Connor, J., concurring). In their view, the test would take into account the objective "perception of a reasonable, informed observer," much like the "reasonable person" in tort law. *Id.* at 773, 779, 115 S.Ct. at 2452, 2455. They would find an Establishment Clause violation "[w]here the government's operation of a public forum has the *effect* of endorsing religion, even if the governmental actor neither intends nor actively encourages

that result." *Id.* at 777, 115 S.Ct. at 2454 (citing *Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S.Ct. 1355, 1368 (1984) (O'Connor, J., concurring)) (emphasis added).

Despite the Court's disagreement over the proper analysis, it agreed that state action was necessary for an Establishment Clause violation. *Id.*; *see also id.* at 799, 115 S.Ct. at 2465-66 (Stevens, J., dissenting) (Establishment Clause "prohibits government from appearing to take a position on questions of religious belief") (internal quotations and citation omitted); *id.* at 817, 115 S.Ct. at 2475 (Ginsburg, J., dissenting) ("a State may not permit . . . a display of this character"). Justice O'Connor disagreed that her view mistakenly attributed private speech to the state, and argued that the Establishment Clause violation would occur "because the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, actually convey a message of endorsement." .*Id.* at 777, 115 S.Ct. at 2454. Thus, "a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval." *Id.* (citation omitted).

That is not the case with Santa Fe I.S.D.'s policy, which allows individual students to give a message or invocation prior to school football games. There is no sponsorship or control of the speech, and thus no endorsement of its content. In the absence of some official endorsement or control on the part of the school, even Justice O'Connor's reasonable, informed observer standard is not violated. "[S]econdary school students are mature enough and are likely to understand that a school does not endorse or support student

speech that it merely permits on a nondiscriminatory basis. The proposition that schools do not endorse everything they fail to censor is not complicated." *Board of Educ. v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372 (1990) (citations omitted). Indeed, by providing that student speakers will be selected by their peers, the football policy underscores that students, not school officials, initiate and control the process.[9] This facial challenge to the policy simply cannot establish that there is no set of circumstances under which this policy would

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9. The fact that the student speaker may express the majority viewpoint does not run afoul of the Constitution. The First Amendment focuses on the rights of the speaker, not of the listener.

> [T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. . . . [W]e have . . . consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Cohen v. California, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786 (1971) (citations omitted). If the speaker chooses to voice an opinion that happens to be aligned with the views of the majority, that does not make the speaker's right to speak any less legitimate. Constitutionally speaking, the majority view is just as valid as the minority view. Any broader view "would effectively empower" the minority "to silence dissidents simply as a matter of personal predilections." Even in the school context, a regulation prohibiting certain viewpoints would violate the constitutional rights of students, at least where there is no showing of material and substantial disruption of school work and discipline. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 513, 89 S.Ct. 733, 740 (1969).

be valid.[10]

Nor does the mere presence of school officials at school football games somehow make student prayer impermissible, as the Fifth Circuit insinuated. *Santa Fe I.S.D.*, 168 F.3d at 823. The Fifth Circuit remarked that "[r]egardless of whether the prayers are selected by vote or spontaneously initiated at these frequently-recurring, informal, school-sponsored events, school officials are present and have the authority to stop the prayers." *Id.* There is no constitutional violation when school officials are present but do not participate in student-initiated religious speech. Similarly, the Establishment Clause is not implicated in the policy's provision allowing the "advice and direction" of the high school principal in the administration of the student-initiated election. "[C]ustodial oversight of the student-initiated religious [activities], merely to ensure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities." *Mergens*, 496 U.S. at 253, 110 S.Ct. at 2373 (citing *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305-06, 105 S.Ct. 1953, 1963-64 (1985)).

The Fifth Circuit would also require school officials step in when students engage in religious speech and "stop the prayers." This myopic view of the First Amendment treats

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10. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100 (1987).

religious speech as a First Amendment orphan.[11] It cannot be reconciled with established First Amendment jurisprudence requiring that above all, the state must be neutral towards religion.[12]

The Court should reject the Fifth Circuit's mistaken conclusion that by speaking at a school-sponsored function a student becomes a state actor for the limited time the student is at the podium. If the Court adopts that reasoning, then any person—student and non-student alike—who speaks at a school event becomes a state actor, potentially exposing the school to liability if he should slip the words "Heavenly Father" into the speech.

And, as a practical matter, how can school districts enforce content-based restrictions on student speech?[13] If school officials do not censor a student's speech beforehand, will

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11. The Court's "precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Pinette*, 515 U.S. at 760, 115 S.Ct. at 2446 (citations omitted).

12. *See infra* Part II.A and note 14.

13. The district court in *Chandler* answered this question by enjoining the students' religious speech and ordering that, should any student violate the injunction, school officials must "take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of the violative conduct as it occurs and to deter similar conduct in the future." *Chandler v. James*, 985 F.Supp. 1062, 1064 (M.D. Ala. 1997), *aff'd in part and vacated in part*, 180 F.3d 1254 (CA11 1999), *petition for cert. filed*, 68 U.S.L.W. 3391 (U.S. Dec. 2, 1999) (No. 99-935). Whether the Fifth Circuit endorses this punitive view is unclear, but it at least believes that school officials must step in and "stop the prayers." *Santa Fe I.S.D.*, 168 F.3d at 823.

they then have to decide whether to pull the plug on the microphone or use the proverbial cane to pull the offending speaker from the stage? What if a non-student, keynote speaker at the school's annual sports award banquet, without warning school administrators, passionately advocates that Jesus Christ take the central role in a person's life? Will this violate the Establishment Clause? With this specter in mind, must school officials review every speaker's remarks for religious content and state censure? Or are officials only required to review student messages?

Not only would such a requirement force school officials to coerce and control the speaker's speech, but it would place an incredible burden on state institutions and officials who know too well that an out-of-place phrase with controversial content could result in litigation. Rather than face this risk, many schools may prohibit all student speech having the potential for religious content. This result, however, is no less constitutionally infirm.

Instead of allowing this uncertainty to squelch student expression, the Court should create a bright-line rule to guide schools in crafting their student speech policies. A workable, constitutional standard would recognize that when a school has created a limited public forum in which students or other speakers may speak without official oversight of the content of the speech, there is no state action that would violate the Establishment Clause.

Applying this standard to Santa Fe's current policy, there is simply no state actor that could be the source of state action, coercion, or control, and the Constitution is satisfied.

II. The Santa Fe Football Policy Furthers Government Neutrality Towards Religion.

A. The Policy Is Facially Neutral.

The Court has consistently instructed that the state must be neutral toward religion, neither advancing nor inhibiting it.[14] The Santa Fe football policy unquestionably allows the neutral accommodation of speech and avoids the pitfalls that have invalidated other policies. *See* Pet'r's Br. on Merits. The policy does not allow school officials to review a student's potentially religious message, which would result in impermissible censorship and excessive entanglement. *See Lemon v. Kurtzman*, 403 U.S. 602, 619-20, 91 S.Ct. 2105, 2114-15 (1971); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 844-45, 115 S.Ct. 2510, 2524 (1995). Nor does it allow officials to write or sponsor prayers, which would unquestionably violate the Establishment Clause. *See Engel v. Vitale*, 370 U.S. 421, 425-34, 82 S.Ct. 1261, 1264-68 (1962). In fact, the policy does not require a prayer or other religious speech at all, but simply allows students to decide whether to give a message or invocation, if any, prior to home football games. The content of any message is entirely up to the student selected.

If Santa Fe's facially neutral policy fails to pass constitutional muster, it is difficult to imagine a policy that

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14. *See, e.g., Everson v. Board of Educ.*, 330 U.S. 1, 18, 67 S.Ct. 504, 513 (1947); *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 684 (1952); *Engel v. Vitale*, 370 U.S. 421, 443, 82 S.Ct. 1261, 1273 (1962) (Douglas, J., concurring); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226, 83 S.Ct. 1560, 1574 (1963); *Lee*, 505 U.S. at 599, 112 S.Ct. at 2661-62 (Blackmun, J., concurring).

would. How can schools ever allow students to take up a microphone if there is some possibility that they might engage in religious speech? Here, students, not school officials, decide whether to give a message at all, and what, if anything, to say. Even if the policy only allowed students to give a "message" prior to school football games, its very neutrality would give students the flexibility to give a prayer. By neutrally accommodating both religious and nonreligious speech, the Santa Fe policy satisfies both the Establishment and Free Speech Clauses.

B. The Policy Has Valid Secular Purposes.

The Fifth Circuit also improperly narrowed the field of valid secular purposes that can underlie a student-message policy, by reaching the remarkable conclusion that solemnization is the only appropriate secular purpose for a student-message policy. *Santa Fe I.S.D.* 168 F.3d at 823. Because football games are "hardly the sober type of annual event that can be appropriately solemnized with prayer," the court came to the conclusion that student-given invocations are never permissible. *Id.* This needlessly limits the category of acceptable secular purposes that can support policies like Santa Fe's. It also underscores the majority's fundamental misunderstanding of the Court's First Amendment jurisprudence. The proper inquiry does not look to the content of the speech, but rather determines whether officials neutrally accommodate all speech in a nondiscriminatory fashion. By permitting, but not requiring, a student-given message or invocation, the Santa Fe football policy does just that.

Despite the Fifth Circuit's holding to the contrary, Santa Fe's football policy is supported by several valid secular purposes. *See Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971). Indeed, the primary reason Santa Fe created its football policy is because the district court ordered Santa Fe to put the policy in place.[15] *See* JA 31-32, JA 42; 168 F.3d at 812. Taking an action in compliance with a court order is certainly a secular motive. Similarly, creating a neutral student-message policy in an attempt to avoid litigation from both proponents and opponents of school prayer serves a wholly secular purpose.[16]

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15. In fact, the policy put in place by the Santa Fe school board was broader and more neutral than that ordered by the judge. He required a "Clear Creek-type" prayer policy, *i.e.*, a nonsectarian and nonproselytizing prayer, *see Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (CA5 1992), but Santa Fe's policy actually provides for either a neutral student message or a prayer.

16. An issue that may arise in future cases but did not occur here, is: if there is evidence that a student-message policy has a secondary religious purpose or has some supporters with religious goals, will this undermine any sincere secular purpose articulated by the school? The Court has answered this question in its prior jurisprudence, and it is clear that policies motivated only in part by religious intent do not violate the Constitution. A statute will violate the Establishment Clause only if it is "*entirely* motivated by a purpose to advance religion." *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 2489 (1985); *see also Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1265-66 (CA11) (Marcus, J., dissenting), *reh'g en banc granted and opinion vacated*, 1999 WL 354889 (CA11 June 3, 1999).

Because this issue could arise in future cases, the Court should reiterate the principle that if a student-message policy in another case has some secondary religious underpinnings, this neither erases the valid secular purposes the policy may serve nor results in the promotion of religion. *Chandler*, 180 F.3d at 1262-63. *Lemon* does not require "that the law's purpose must be unrelated to religion—that would amount to a requirement 'that the government show a callous indifference to religious groups,' and the Establishment Clause has never been so interpreted." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335, 107 S.Ct. 2862, 2868 (1987) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 684 (1952)). Instead, "*Lemon's* 'purpose' requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id.*

Allowing students to have a message or invocation prior to school football games also promotes good sportsmanship and honest and fair play in an otherwise rough and dangerous sport, and encourages teamwork and individual excellence.[17] In addition to sportsmanship, a state's neutral intent to prevent discrimination against religious speech and allow free speech regardless of viewpoint is a valid secular purpose under *Lemon*.[18] *See Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1543 (CA6 1992) (a "policy of treating religious speech the same as all other speech certainly serves a secular purpose.").

Instead of addressing these valid secular purposes, the Fifth Circuit came to the remarkable conclusion that solemnization is the only appropriate secular purpose for a student-message policy. *Santa Fe I.S.D.* 168 F.3d at 823. The Fifth Circuit erred, and the Court should hold the policy is constitutional.

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17. *See Santa Fe I.S.D.*, 168 F.3d at 835 (Jolly, J., dissenting).

18. *See Board of Educ. v. Mergens*, 496 U.S. 226, 248, 110 S.Ct. 2356, 2371 (1990) (plurality) (citing *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335-36, 107 S.Ct. 2862, 2868-69 (1987); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773, 93 S.Ct. 2955, 2965 (1973)); *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1543 (CA6 1992).

III. THE COURT SHOULD ADDRESS THE FIFTH CIRCUIT'S PROHIBITION ON ALL BUT NONSECTARIAN, NONPROSELYTIZING STUDENT SPEECH.

Had the Fifth Circuit upheld Santa Fe's football policy, it nevertheless would have imposed an unconstitutional condition on speech occurring under that policy because, in the Fifth Circuit, student religious speech given at school-sponsored events must be both "nonsectarian" and "nonproselytizing." Relying on its opinion in *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (CA5 1992), the Fifth Circuit held that the graduation policy must have that limitation, and assumed that the football policy must necessarily have the same requirement.

The court framed the issue as "whether the pure Clear Creek Prayer Policy embodied in the alternative fall-back provision of the policy can be extended to football games." *Santa Fe I.S.D.*, 168 F.3d at 822. The "pure" Clear Creek policy, which the court adopted for the graduation policy, allows only nonsectarian, nonproselytizing prayers. *Id.* The Court should address this content-based requirement because even if it should reverse the Fifth Circuit's complete proscription of student religious speech at school football games, the circuit's prohibition on all but nonsectarian, nonproselytizing student prayer will still stand. Although the Court did not grant the writ to address the graduation policy, the Fifth Circuit's nonsectarian, nonproselytizing content requirement is before the Court because the Fifth Circuit assumed that it would also apply to the football policy.

Like its complete prohibition on any religious speech at football games, the circuit's nonsectarian, nonproselytizing

requirement would force school officials to discriminate based on religious viewpoint and the content of student speech.[19] Yet the Court has "not excluded from free-speech protections religious proselytizing." *Capitol Square Rev. Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 2446 (1995) (citing *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2563 (1981)). The Court has been abundantly clear that "state regulation of speech should be content-neutral." *Widmar v. Vincent*, 454 U.S. 263, 277, 102 S.Ct. 269, 278 (1981). The Fifth Circuit's decision would require just the opposite—content-based state regulation of speech.

Moreover, this content-based requirement would require school officials to engage in viewpoint discrimination, again in violation of the First Amendment. Once one type of religious speech is permitted, the state must neutrally accommodate all religious viewpoints. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394, 113 S. Ct. 2141, 2147 (1993) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 3451(1985)); *Widmar*, 454 U.S. at 271-72, 277, 102 S.Ct. at 275-76, 278. But the Fifth Circuit's Clear Creek-

---

19. The Fifth Circuit remarkably concedes, in the context of the graduation policy, that "if public forum analysis were applicable, then *Clear Creek*'s proscription of prayer that is sectarian and proselytizing would violate the First Amendment after all, but would do so on grounds we never considered in *Clear Creek II*." *Santa Fe I.S.D.*, 168 F.3d at 821 (citing *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (CA5 1992)). As the Court recognized in *Lamb's Chapel*, even if the religious activity occurs in a nonpublic forum, a school district will violate free speech rights if it discriminates solely on the basis of religious viewpoint. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-96, 113 S. Ct. 2141, 2146-49 (1993).

type policy permits only one type of religious speech—ecumenical—to the exclusion of all others. This content-based requirement simply cannot be reconciled with the Court's established First Amendment jurisprudence, and the Court should make it clear that it is unconstitutional.

CONCLUSION

For these reasons, *amici* respectfully request that the Court reverse the judgment of the circuit court.

Respectfully submitted.

JOHN CORNYN
Attorney General of Texas
ANDY TAYLOR
First Assistant Attorney General
LINDA S. EADS
Deputy Attorney General for Litigation
GREGORY S. COLEMAN
Solicitor General
JULIE CARUTHERS PARSLEY
Deputy Solicitor General
Counsel of Record
MEREDITH B. PARENTI
Assistant Solicitor General

P.O. Box 12548
Austin, TX 78711-2548
(512) 936-1896

COUNSEL FOR *AMICI*

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In The

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF SENATOR JAMES M. INHOFE (R OKLAHOMA); CONGRESSMEN MARK E. SOUDER (R IN 4), JOSEPH R. PITTS (R PA 16), RICHARD K. ARMEY (R TX 26), TOM DELAY (R TX 22), ROBERT B. ADERHOLT (R AL 4), BOB BARR (R GA 7), ROSCOE G. BARTLETT (R MD 6), JOE L. BARTON (R TX 6), HELEN CHENOWETH-HAGE (R ID 1), JAMES DEMINT (R SC 4), JAY W. DICKEY (R AK 4), VIRGIL H. GOODE, JR. (D VA 5), RALPH M. HALL (D TX 4), JOHN N. HOSTETTLER (R IN 8), SAM JOHNSON (R TX 3), SUE MYRICK (R NC 9), RON PAUL (R TX 14), TOM TANCREDO (R CO 6), ZACH WAMP (R TN 3), DAVE WELDON (R FL 15); AND WALLBUILDERS, INC.
in support of the *Petitioner*

Barry C. Hodge
Counsel of Record for Amici Curiae
The National Legal Foundation
11521-E Midlothian Turnpike
Richmond, VA 23235
(804) 897-2340

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INTEREST OF AMICI CURIAE[1]

Amici curiae Senator James M. Inhofe (R Oklahoma) and Congressmen Mark E. Souder (R IN 4), Joseph R. Pitts (R PA 16), Richard K. Armey (R TX 26), Tom DeLay (R TX 22), Robert B. Aderholt (R AL 4), Bob Barr (R GA 7), Roscoe G. Bartlett (R MD 6), Joe L. Barton (R TX 6), Helen Chenoweth-Hage (R ID 1), James DeMint (R SC 4), Jay W. Dickey (R AK 4), Virgil H. Goode, Jr. (D VA 5), Ralph M. Hall (D TX 4), John N. Hostettler (R IN 8), Sam Johnson (R TX 3), Sue Myrick (R NC 9), Ron Paul (R TX 14), Tom Tancredo (R CO 6), Zach Wamp (R TN 3), and Dave Weldon (R FL 15) are members of the United States Senate and of the United States House of Representatives. Senator Inhofe represents the state of Oklahoma with a population of approximately 3.3 million. Each member of the House represents approximately 600,000 to 650,000 constituents. In total these amici represent approximately 15.8 million Americans. Each of these amici is acutely aware that the decision of this Court in this case will impact his or her constituents and believes that it is not in the best interest of those constituents to deny them the right to engage in prayers at various public events. Although this case involves a facial challenge to one school district's policy that might or might not even result in prayers at football games, amici are aware that the possible ramifications of the decision are much broader than the limited facts of the present controversy.

Amicus curiae WallBuilders, Inc. is a 501c (3) organization that is dedicated to the restoration of the moral and religious foundation on which America was built. As

[1] Counsel of record to the parties in this case have consented to the filing of this brief through blanket consent letters which have been filed with the Clerk. Additionally, Counsel for Jane Doe, et al. has consented by individual letter to Counsel of Record for amici. No counsel for any party has authored this brief in whole or in part. No person or entity, other than the amicus curiae WallBuilders, Inc., has made any monetary contribution to the preparation or submission of this brief.

such, the organization has a direct interest in seeing that students be allowed to pray if they so desire.

SUMMARY OF ARGUMENT

Justice O'Connor has warned that Establishment Clause jurisprudence, including the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), must be applied in a manner that takes into account the various different categories of Establishment Clause cases. Justice Kennedy issued a similar warning in *Lee v. Weisman*, 505 U.S. 577 (1992), that applies to *Lee* itself. When these warnings are heeded, these tests will not be applied woodenly. When the underlying principles are understood, Santa Fe's Football Prayer Policy is clearly constitutional. The Eleventh Circuit's recent case of *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), provides a good model for how to apply Establishment Clause principles to the case at bar.

By way of contrast, the test employed by the Fifth Circuit panel in this case should be rejected. The panel opinion in this case introduced a new test into the already confused Establishment Clause Jurisprudence, namely the "solemnization test." Under this test, the court said that football games were not the type of events that are capable of being solemnized. Therefore, students cannot pray at football games. This test is bad for two reasons. First, the school proffered other secular purposes, but these reasons were ignored. But second and more importantly, any type of public prayers at public events can now be challenged as inappropriate under the theory that the event in question cannot be solemnized.

In addition to these problems, the test seems to be driven by an impermissible hostility towards religion.

If the Supreme Court adopts this test, the implications are obvious and disconcerting. This country will face years of litigation in which prayers at various public events will be

challenged. In all of these cases, judges will have no legal principle to guide them—it will all be the judge's opinion.

ARGUMENT

I. INTRODUCTION—THE SEARCH FOR PROPER PRINCIPLES

This case is of great interest and significance to the American people. Prayer at public events is a long standing tradition in this country—a tradition that should be allowed to continue unless and until someone can demonstrate that it violates the Constitution. In this case as in many others, a federal court has declared that such prayers—this time at football games—are, in fact, unconstitutional. Yet as this case comes before this Court, it is hard to tell *why* the Fifth Circuit held the Policy regarding student-led, student-initiated speech at football games to be unconstitutional. The policy simply allows for students to decide whether they will have a speaker prior to sporting events. If students so chose, the policy allows the selected student to decide whether his or her private speech will include a "brief invocation and/or message." *Doe v. Santa Fe Ind. Sch. Dist.*, 168 F.3d 806, 812 (5th Cir. 1999).

In part it is hard to tell why the Fifth Circuit held the Football Pre-game Policy unconstitutional because the court dedicated most of its opinion to the issue of the School District's policy on graduation prayer and gave short shrift—indeed just one paragraph—to its analysis of the Football Policy. But that is not the only reason it is difficult to discover the court's rationale. The Fifth Circuit's rationale is also hard to understand because it did little more than quote the holding of one of its prior cases, *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).

However, there are two interrelated problems with the *Santa Fe* court's use of *Duncanville*. First, the court significantly altered the quotation upon which it relied. The

Santa Fe court quoted the *Duncanville* court as saying, "Here, we are dealing with a setting [football and basketball games] far less solemn and extraordinary . . . ." *Santa Fe*, 168 F.3d at 822-23 (*quoting Duncanville*) (alteration original to *Santa Fe*). But this is simply not a justifiable alteration of the quotation. The *Duncanville* court was dealing with school employee-supervised prayers at basketball team practices, in the basketball team locker room, after basketball games at center court, and on the basketball team bus. The *Duncanville* court specifically stated: "DISD [Duncanville Independent School District] makes no attempt to distinguish the prayers given before football games and at awards ceremonies from those given at basketball games. *To the extend that these situations are materially alike*, our opinion applies equally." *Duncanville*, at 405, n.2 (emphasis added).

Whether or not there are material differences between the various basketball prayers at issue in *Duncanville* and that district's football prayers, there are clearly material differences between Duncanville's basketball prayers and Santa Fe's Football Game Message Policy at issue here. As just one example, the Message Policy at issue here does not authorize prayers conducted under the direct supervision of a school employee who routinely and repeatedly has control of a small number of the same students, as were the prayers in *Duncanville*. *Duncanville* at 404. Thus, the *Duncanville* analysis does not, at least on its face, apply to the *Santa Fe* case at all. Yet that is as close to an articulated rationale as the court gave.[2]

This points to the second interrelated problem. The *Santa Fe* court was not careful to apply the proper

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[2] It is true that the court stated in a footnote early in its opinion that "Although for the sake of simplicity and clarity we address SFISD's arguments only as they relate to graduation ceremonies, our analysis applies with equal, if not greater, force to the Football Policy as well." Santa Fe at 814, n.7. However, one of the graduation prayer policies was *upheld*. The only grounds for declaring the Football Pre-game Policy *un*constitutional was the solemnization issue.

Establishment clause principles in a highly sensitive, fact-specific, "case-category-specific"[3] manner. Instead it merely took some Establishment Clause verbiage—entirely out of context—and applied it without even trying to distill the underlying principles and separating those that applied to the facts before it from those that did not.

The *Santa Fe Court* is not alone in this shortcoming. Indeed, many federal courts have failed to abide by the admonitions of several members of this Court that Establishment Clause cases must be analyzed using only those principles that are appropriate to various sub-categories of cases.

Had the court analyzed the Football Pre-game Policy with this admonition in mind, it would have found the prayers constitutional, whether it had used the *Lemon* test or the *Lee* test. Whether one employs *Lemon* or *Lee* or both, one must beware the problem described by Justice O'Connor in the following lengthy but important passage:

> It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause. . . .
>
> But the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content-neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on. This simply reflects the necessary recognition that the interests relevant to the Free Speech Clause inquiry-personal liberty, an informed citizenry,

[3] See *infra* for discussion of this term.

government efficiency, public order, and so on-are present in different degrees in each context.

And setting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless. I suppose one can say that the general test for all free speech cases is "a regulation is valid if the interests asserted by the government are stronger than the interests of the speaker and the listeners," but this would hardly be a serviceable formulation. Similarly, *Lemon* has, with some justification, been criticized on this score.

Moreover, shoehorning new problems into a test that does not reflect the special concerns raised by those problems tends to deform the language of the test. Relatively simple phrases like "primary effect . . . that neither advances nor inhibits religion" and "entanglement," acquire more and more complicated definitions which stray ever further from their literal meaning.

Bd. of Ed. of Kiryas Joel. v. Grumet, 512 U.S. 687, 718-19 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

After drawing these parallels between this Court's Free Speech and Establishment Clause jurisdiction, Justice O'Connor went on to explain the dangers present in trying to woodenly apply the *Lemon* test to the wide diversity of Establishment Clause cases the courts have had to deal with:

> I think it is more useful to recognize the relevant concerns in each case on their own terms, rather than trying to squeeze them into language that does not really apply to them.

Finally, another danger to keep in mind is that the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with *Lemon*.

Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches. Some cases, like this one, involve government actions targeted at particular individuals or groups, imposing special duties or giving special benefits. Cases involving government speech on religious topics, see, e.g., *Lee v. Weisman*, supra; *Allegheny County v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Stone v. Graham*, 449 U.S. 39 (1980), seem to me to fall into a different category, and to require an analysis focusing on whether the speech endorses or disapproves of religion, rather than on whether the government action is neutral with regard to religion. *See Allegheny County*, *supra*, at 623-637 (O'Connor, J., concurring in part and concurring in judgment).

Another category encompasses cases in which the government must make decisions about matters of religious doctrine and religious law. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). . . . Government delegations of power to religious bodies may make up yet another category. As

> *Larkin* itself suggested, government impartiality towards religion may not be enough in such situations: A law that bars all alcohol sales within some distance of a church, school, or hospital may be valid, but an equally evenhanded law that gives each institution discretionary power over the sales may not be. *Larkin*, supra, at 123-124. *Of course, there may well be additional categories, or more opportune places to draw the lines between the categories.*

Id. at 719-21 (emphasis added).

Having already pointed out some of the problems with an overly-unitary approach, Justice O'Connor then discussed some of the advantages of the case-category-specific approach:

> As the Court's opinion today shows, the slide away from *Lemon's* unitary approach is well under way. A return to *Lemon*, even if possible, would likely be futile, regardless of where one stands on the substantive Establishment Clause questions. I think a less unitary approach provides a better structure for analysis. If each test covers a narrower and more homogeneous area, the tests may be more precise and therefore easier to apply. There may be more opportunity to pay attention to the specific nuances of each area. There might also be, I hope, more consensus on each of the narrow tests than there has been on a broad test. And abandoning the *Lemon* framework need not mean abandoning some of the insights that the test reflected, nor the insights of the cases that applied it.

> . . . [I]t seems to me that the case law will better be able to evolve towards this if it is freed from the *Lemon* test's rigid influence. The hard questions would, of course, still have to be asked; but they will be asked within a more carefully tailored and less distorted framework.

Id. at 721.

This quotation is not invoked here to advocate that this Court ignore or reject *Lemon* (although that could be considered a major thrust of Justice O'Connor's comments). As has been pointed out repeatedly, *Lemon* has never been overturned. Rather, the point is to note that whether one uses *Lemon* or *Lee*, the analysis must be case-category specific.[4]

In fact, Justice O'Connor's process could be, indeed should be, followed even further. For example, she discussed *Lee* with *Allegheney County* and *Stone*. Yet there are important differences between graduation prayer cases and religious display cases. One such difference is that the religious display category of Establishment Clause cases have different standing rules than other Establishment Clause cases in at least some Circuits. *See, e.g., City of Edmond v. Robinson*, 134 L. Ed. 2d 801 (*cert. denial*) (Rehnquist, C.J., Scalia, Thomas, JJ., *dissenting*).

Thus, the lesson of Justice O'Connor's quotation is that under both *Lemon* and *Lee*, one must use a very case-category specific approach. A principles-not-prongs approach will produce the best results. When courts do not heed this warning, jurisprudential chaos is the result.

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[4] Nor is it the purpose of this brief to suggest other replacement tests. Amici believe that it *would* be possible to have a more unified approach to Establishment Clause jurisprudence were that jurisprudence truer to the intent of the Framers. The entire discussion in this brief is based on "what is," not on what "might be" or "what ought to be."

II. THE PROPER APPROACH UNDER *LEMON*

The decision of the *Santa Fe* court has seriously exacerbated the confused Establishment Clause jurisprudence in the Fifth Circuit. In fact, six judges joined a dissenting opinion filed by a seventh judge in the Denial of Rehearing *En Banc* in the present case. *Doe v. Santa Fe Ind. Sch. Dist.*, 171 F.3d 1013, 1014 (5th Cir. 1999). Judge Jolly, who wrote the dissent, and his colleagues aimed some unusually harsh words at the panel decision. For example, the dissent states:

> The *Santa Fe* majority also casts our Circuit's Establishment Clause jurisprudence into throes of uncertainty. The majority opinions in *Santa Fe* and *Jones v. Clear Creek Independent Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), are so clearly in conflict with each other that school districts within our jurisdiction will have no guidance on how to interpret our confused precedent.

Id. at 1015. Although most of what was written in the opinion was aimed at that part of the panel decision that discussed graduation prayers, it is true that *Santa Fe* has created a "jurisprudential quagmire" in the Fifth Circuit. *Id.* We have reached a sad state of affairs when seven judges characterize their own jurisprudence in this manner.

And the Fifth Circuit is by no means alone. Perhaps an even more egregious example of ignoring the use of sub-category specific analysis is provided by the recent panel decision in *Adler v. Duval Co. Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999) (*Adler II*). *Adler II* involved graduation prayers. In its *Lemon* analysis, the *Adler II* court looked at cases dealing with creation science, *Edwards v. Aguillard,* 482 U.S. 578 (1987); moments of silence, *Wallace v. Jaffree*, 472 U.S. 38 (1985); nativity scenes, *Lynch v. Donnelly,* 465 U.S. 668 (1984), charitable solicitation laws, *Church of Scientology*

Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514 (11th Cir.1993), and prayer at football games, *Jager v. Douglas County Sch. Dist.,* 862 F.2d 824, (11th Cir. 1989), in addition to cases dealing with graduation prayer. Presumably, *some* of the propositions for which these cases were cited could validly be applied across categories. Nonetheless, the overall result was exactly what Justice O'Connor predicted it would be—confusion.

Unfortunately, an already bad result was compounded because the graduation prayer cases that the *Adler II* majority cited, *Doe v. Santa Fe Indep. Sch. Dist.,* 168 F.3d 806 (5th Cir.1999) (the case now, in part, before this Court); *Doe v. Madison Sch. Dist. No. 321,* 147 F.3d 832 (9th Cir.1998); *ACLU of New Jersey v. Black Horse Pike Regional Bd. of Ed.,* 84 F.3d 1471 (3d Cir.1996) (*en banc*); *Harris v. Joint Sch. Dist. No. 241,* 41 F.3d 447, (9th Cir. 1994), went even further afield and incorporated this cross-categorical analysis multiple times over. The cases utilized by the *Santa Fe, Madison, Black Horse, and Harris* courts in their *Lemon* analyses included the following Establishment Clause categories: tax funding, services, religious displays (in and out of schools), baccalaureate services, equal access, Bible reading, release time, publishing, moments of silence, legislative chaplains, employment, and school districting cases, in addition to school prayer cases in numerous settings, including the classroom, assemblies, after school, and at sports events. See *Santa Fe, Madison, Black Horse, and Harris, passim.*

Because of this state of affairs and because of our concern over the disastrous results it is producing around the country, *amici* urge this Court to give guidance to the federal courts in how to apply Establishment Clause principles. Even without this Court overruling *Lemon*, the federal courts should be capable of ascertaining and applying *appropriate* Establishment Clause principles to various categories of prayer cases.

As an example of a court that got it right, *amici* suggest the approach of the Eleventh Circuit Court of Appeals in *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999). In Chandler, the Eleventh Circuit had before it an injunction issued by a trial court that prohibited, among other things, a school district from permitting certain religious activities by students at events such as football games, graduation ceremonies, and other school events. The Alabama Attorney General's Office challenged the injunction specifically as it related to the aspects just mentioned, i.e, prohibiting student religious speech at various events including football games. *Id.* at 1257-58. The Eleventh Circuit vacated the entire injunction holding that the prohibition against permitting student religious speech violate the First Amendment. *Id.* at 1266. Given that religious speech at sporting events was involved, the analysis of the *Chandler* court is very instructive in the instant case.

The *Chandler* court never engaged in a standard prong-by-prong *Lemon* analysis. In fact, other than in a parenthetical in footnote 12, the *Chandler* court never even mentioned *Lemon*. Indeed, the lion's share of its analysis was done under the headings of Free Exercise and Free Speech. Yet one finds throughout the Establishment, Free Exercise, and Free Speech portions of the opinion—in a nuanced and case-category appropriate manner—*Lemon's* Establishment Clause *principles*. For example, in analyzing other cases, the *Chandler* court spoke of "the State's decision to create an exclusively religious medium . . . not the 'permitting' of religious speech . . ." *Chandler,* 180 F.3d at 1259. This is the language of purpose. The opinion addresses whether certain practices advance or endorse religion; it speaks of hostility and neutrality. *Id.* at 1259-1265. The opinion discusses teacher participation that creates entanglement. *Id.* at 1264.

Thus, *Chandler* utilized *Lemon's* principles without ever invoking the test itself. Yet *where appropriate*, the *Lemon* principles were utilized. And the result was much more desirable, in that that court also heeded Justice

O'Connor's admonition to pay attention to case categories. The *Chandler* court did not woodenly examine what various other courts had said under each of *Lemon's* prongs, regardless of context, and thereby introduce extraneous statements applicable to totally different categories of cases. Other than one sentence that quickly summarized several lower court graduation cases, *Id.* at 1259, the *Chandler* court stuck almost exclusively[5] to Supreme Court cases involving prayer and other religious speech in academic contexts. *Id.* at 1257-1265.

The conclusion of the *Chandler* court under its category-specific-principles-not-prongs approach to *Lemon* is clear: Schools cannot refuse to permit students to speak religiously at school-organized or -sanctioned events. *Id.* at 1265. *Chandler's* message is also clear that courts may not order schools to refuse to permit such speech. *Id.* Quite to the contrary, schools have a constitutional *duty* to affirmatively permit this speech. *Id.* at 1263. Thus, under the principles of *Lemon*, as appropriately applied in *Chandler*, the Football Policy in this case is constitutional.

It is of interest to note that *Adler II* and *Chandler* both came out of the Eleventh Circuit. This highlights the confusion that exists in the federal courts. If we continue to use *Adler II* and *Chandler* as examples of a court that got it right and a court that got it wrong, we gain several more useful insights.

Suppose one takes the approach of the *Adler II* majority. The majority did not examine the prayer guidelines before it under *Lemon's* excessive entanglement prong. However, it found that both the policy's purpose and its effect were to "permit prayer." *Adler II*, 174 F.3d at 1249-51. Of course, some will disagree with these assertions. They will find the arguments contained in the dissent more persuasive. *See id.* at 1265-71. But let us assume *arguendo* that the *Adler*

[5] Most notably, there are several references to *Lynch*. There are other minor exceptions as well.

II majority was correct. If the purpose and effect of the guidelines were to permit prayer, the guidelines are, as we have just seen, constitutional, not unconstitutional under *Chandler*.

Amici suggest that the *Chandler* court has struck exactly the right balance under those Establishment Clause principles which apply to prayers at school-related public events:

> How, then, does a school accommodate religious expression without commanding it? . . . the answer is simply it is to be "permitted." Not required. Not commanded. Not even suggested. Simply permitted. If students, or other private parties, wish to speak religiously while in school or at school-related events, they may exercise their First Amendment right to do so.

Chandler, 180 F.3d at 1264 (describing the position of the Defendant school board, which position the court held to be correct).

The *Chandler* court spoke other strong words on this point, stating "It would be easy simply to banish prayer from our public institutions, but this would be not only constitutionally incorrect, but also fundamentally unfair to our society." *Id.* Furthermore, the *Chandler* court called permitting students to pray a "constitutional requirement." *Id.* What the *Adler II* court found to be a constitutional infirmity, the *Chandler* court correctly characterized as a constitutional requirement. Therefore, if the *Adler II* court was right about the guidelines' purpose and effect, the guidelines are *quintessentially* constitutional. They enable the school district to fulfill its constitutional duty and they protect the rights of all. Similarly here, the Football Pre-Game Policy is quintessentially constitutional because it allows Santa Fe ISD to fulfill its constitutional duty and it protects the rights of all.

Only one thing remains to be said about the more wooden *Lemon* approach of the *Adler II* court (since we are for the moment exploring how the guidelines at issue there and the Football Pre-game Policy at issue here should fare under this approach). It may seem strange to say that "permitting prayer" serves a "secular" purpose. After all, prayer is not secular. However, there are several ready answers. The first answer is that this policy neither advances nor inhibits religion. It ensures neutrality toward religion. That is a secular purpose. (Although the neither-advances-nor-inhibits paradigm is usually associated with the effect prong, this same paradigm has been applied to the purpose prong and seems to shed light here. *See, e.g., Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963); and *Agostini v. Felton*, 521 U.S. 203, ___, 117 S. Ct. 1997, 2010 (1998).) The second answer is provided by the forum analysis approach discussed by Judge Jolly in his *Santa Fe* panel dissent: providing a neutral forum for speech serves a secular purpose. *Santa Fe,* 168 F.3d at 824-36 (Jolly, J., dissenting).

III. THE PROPER APPROACH UNDER *LEE V. WEISMAN*

The *Santa Fe* court also missed the mark on *Lee v. Weisman*. It held that the Football Pre-game Policy was unconstitutional despite being offered under a "pure Clear Creek Prayer Policy." *Santa Fe,* 168 F.3d at 822. In other words, the policy involved nonsectarian, nonproselytizing prayer such as had been upheld (at graduations) in the *Clear Creek II* case under various analyses, including a *Lee* analysis. Thus, the *Santa Fe* court believed that the Football Pre-game Policy was unconstitutional under *Lee*. But a proper understanding of the *principles* of *Lee* leads to the conclusion that the Football Pre-Game Policy is constitutional.

In *Lee*, Justice Kennedy expressed the same concern that Justice O'Connor expressed in *Kiryas Joel* (see above)

that Establishment Clause principles be utilized in case-category-fact-specific manner:

> These *dominant facts* mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are, in a fair and real sense, obligatory, though the school district does not require attendance as a condition for receipt of the diploma.
>
> This case does not require us to revisit the difficult questions dividing us in recent cases, *questions of the definition and full scope of the principles governing the extent of permitted accommodation* by the State for the religious beliefs and practices of many of its citizens. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573 (1989*); Wallace v. Jaffree,* 472 U.S. 38 (1985*); Lynch v. Donnelly*, 465 U.S. 668, (1984). For without reference to those *principles in other contexts*, the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. . . . The government involvement with religious activity *in this case* is pervasive, to the point of creating a state-sponsored and state-directed religious

> exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine *the question before us*.

Lee at 596-97 (emphasis added).

Thus, at bottom, the *principles* of *Lee* could be considered the same as the *principles* of *Lemon*. However, there is more that can profitably be gained by looking at the instant case through the lens of *Lee*. First, we should take Justice Kennedy's admonition seriously not to ignore the each case's context. Applying this principle to *Lee* itself means that if the dominant facts are not present, various prayers or prayer policies could very well be constitutional. In other words, *Lee* is deliberately self-limiting. This is evident from Justice Kennedy's own words. Justice Kennedy wrote: "We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." *Id*. at 598-99.

These words take on new meaning when one stops to think of examples. Here we are not dealing with graduation time. Therefore, we need only imagine examples of religious values, practices and persons interacting public schools and their students at other times throughout the educational process.

An example of religious values, practices and persons interacting with public schools *students* would be students encountering a sidewalk evangelist on a public sidewalk near their school. The evangelist's target audience is specifically school students, but the activities do not implicate the *school*.

But the Football Policy at issue here is an example of religious values, practices and persons interacting with *public schools* throughout the educational process. Here, the *schools* sponsor an event that involves students, parents, other

relatives, and the general public. It is in a very real sense an event of the entire community. If, in fact, the students decide to have a speaker, and if in fact, the speaker decides on his or her own initiative to include a religious sentiment, that is protected speech.

Furthermore, football games, as the *Santa Fe* court points out, are not the unique, once-in-a-lifetime event that graduation is. *Santa Fe,* 168 F.3d at 822-23. In *Lee*, Justice Kennedy described the multiplicity of unique characteristics of graduation ceremonies. *Lee*, 505 U.S. at 595. It was *because of* these characteristics and the high cost of forfeiting this unique experience that Justice Kennedy wrote that the graduation ceremony was "in a fair and real sense obligatory." Id. at 586. Whatever place high school football games may have in Santa Fe or any other community, they do not partake of the characteristics that Justice Kennedy so eloquently described. Without the same obligatory nature of the event, the principles of *Lee* indicate the constitutionality, not the unconstitutionality of the football prayers.

Another *Lee* principle also shows that the Football Policy is constitutional. The *Lee* Court explained that psychological coercion would likely occur in "a state-sanctioned religious exercise." *Id*. at 597. According to the Court, the entire graduation ceremony was not the state-sanctioned religious exercise; rather the prayer itself was the state-sanctioned religious exercise. *Id*. at 594. If there is no state-sanctioned religious exercise there is no need to be concerned about the state psychologically coercing anyone. And the *Lee* Court clearly stated that it was *clergy-led state-mandated* prayer that constituted a state-sanctioned religious exercise. *Id*. at 597. In the instant case there is no state-mandated prayer and no clergy-led prayer. Therefore, there is no state-sanctioned religious exercise and no concern over psychological coercion.

Thus, one sees that, whether analyzed under the principles of *Lemon* or the principles of *Lee*, Santa Fe ISD's Football Pre-game Policy is clearly constitutional. *Amici* urge this Court to reject the largely unarticulated and muddled approach of the *Santa Fe* court. Instead, this Court should apply a principles-not-prongs approach to the case before it. *Amici* commend the *Chandler* analysis to this Court as a paradigm of the proper approach. By adopting the *Chandler* approach, this Court will not only declare the constitutionality of the Policy at issue in this case, it will also clarify for the federal courts the proper approach to the myriad of Establishment Clause cases they encounter.

IV. THE FIFTH CIRCUIT'S NEW ESTABLISHMENT CLAUSE TEST

In contrast to the approach of the *Chandler* court, the Fifth Circuit Court of Appeals, in the present case, has adopted a dangerous new "legal test" that is not really legal at all. The Fifth Circuit has decided that public prayers will now be subjected to a "solemnization test." In holding prayers at football games unconstitutional, the court wrote "[t]he prayers are to be delivered *at football games*—hardly the sober type of annual event that can be appropriately solemnized with prayer." *Doe v. Santa Fe Indep. Sch. Dist.* 168 F.3d 806, 823 (emphasis in the original).

The ramifications of such a test are startling to say the least. This country will face years of litigation in which prayers at various public events will be challenged. Event after event will have to be categorized as either solemnizable or non-solemnizable. As more and more events are categorized, litigants will try to persuade judges that the event over which they are fighting is similar to or different from one or another event upon which some other judge has already ruled. Thus, they will argue, the new event should either be characterized as solemnizable or non-solemnizable, depending on what side of the issue they are on. And in all of

this, judges will have no legal principles to guide them—it will all be the judge's opinion (no doubt camouflaged as much as possible in legalese and precedent to try to give the appearance that principles are being invoked). This is not what American's religious liberties should depend upon.

V. THE FIFTH CIRCUIT'S ANALYSIS CREATES HOSTILITY, NOT NEUTRALITY, TOWARD RELIGION

The Fifth Circuit opinion in *Santa Fe* appears to be driven by distaste for its own decision in *Jones v. Clear Creek*, 977 F.2d 963 (5th Cir. 1992) (*Clear Creek II*), and for this Court's decision in *Bd. Of Educ. Of Westside Community Sch. v. Mergens*, 496 U.S. 248 (1990), as well. For example, the court wrote:

> There is, moreover, a crucial distinction between the speech involved in *Mergens* and the speech that SFISD's policy would allow. In *Mergens*, the Court held that permitting the Christian student organization to meet on school grounds after class and to recruit members through the school newspaper, bulletin boards, and public address system, did not violate the Establishment Clause. Thus, the organization was not permitted to deliver a religious message directly to the student body. The religious organization did not use any of the various methods of communication controlled by the school to proselytize—or to deliver religious messages of any nature—but rather confined such activities to meetings held after class with virtually no trace of governmental imprimatur. *Clear Creek II* took *Mergens* one baby step closer to the brink, allowing delivery of prayer to the student body but only if such prayer were

> nonsectarian and nonproselytizing. SFISD's July Policy, however, would plunge over the cliff, by permitting students to present overtly sectarian and proselytizing religious prayers to a group of students clearly assembled at the behest of the government.

Santa Fe, 168 F.3d at 821, n.11.

The language of taking "*Mergens* one baby step closer to the brink" implies (if not more than implies) that *Mergens* itself was headed in a dangerous direction. Yet for this court to have decided *Mergens* in the opposite manner would have been to treat religious students differently than all other students.

The *Santa Fe* court also went out of its way in several passages to point out that it had no choice but to follow *Clear Creek II*. For example, the court noted:

> In beginning our analysis, it is well to note that our role is necessarily limited to elucidating our prior precedent in the light of its context and such subsequent clarifications as the Supreme Court has announced. *See Hogue v. Johnson*, 131 F.3d 466, 491 (5th Cir. 1997) ("One panel of this Court may not overrule another [absent an intervening decision to the contrary by the Supreme Court or the en banc court . . .]."), *cert. denied*, __ U.S. __, 118 S. Ct. 1297 (1998).

Santa Fe, 168 F.3d at 814.

Indeed, some passages from the court's opinion do not merely objectively state that it is bound by *Clear Creek II*, but rather appear to engage in sarcasm or drip frustration. Several examples illustrate this:

> More to the point, we now conclude, in obeisance to the ineluctable precedent of *Clear Creek II*, that a knock-off of a Clear Creek Prayer Policy that does not limit speakers to nonsectarian, nonproselytizing invocations and benedictions violates the dictates of the Establishment Clause.

Santa Fe, 168 F.3d at 813.

And again, we read:

> Only the combination of the factors relied on in *Clear Creek II*—that the prayer was student-led *and* nonsectarian, nonproselytizing—saved that school district's graduation prayers from being anathematized a "formal religious exercise" for the purposes of *Lee's* Coercion Test. *Cf. Lee*, 505 U.S. at 588-90 (holding nonsectarian, nonproselytizing graduation prayer delivered by rabbi was "formal religious exercise"). Again, because sectarian and proselytizing prayers are by their very nature designed to promote a particular religious viewpoint rather than solemnize an otherwise purely secular event, they cannot find sanctuary in the tightly circumscribed safe harbor of *Clear Creek II* and thereby avoid the appellation "formal religious exercise."

Santa Fe, 168 F.3d at 818 (emphasis original).

Two final examples further demonstrate the attitude of the *Santa Fe* court:

> In sum, our *Clear Creek II* opinion explicitly — and (we are bound by *stare decisis* to acknowledge) correctly — relies on Clear Creek ISD's nonsectarian, nonproselytizing

> restrictions to dodge the outcome otherwise dictated by *Lee*.

Santa Fe, 168 F.3d at 822.

> Whether or not we agree with *Clear Creek II's* conclusion that the student-led graduation prayers do not transgress the Establishment Clause even though they do not constitute private speech, we are bound by its judgment unless and until this Court reconsiders the matter *en banc* or the Supreme Court holds otherwise.

Santa Fe, 168 F.3d at 821, n.12.

Distaste for *Clear Creek II* and especially for *Mergens* smacks of the hostility towards religion that this Court and various individual Justices have repeatedly said is not appropriate in this country. In *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952), this Court noted:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in

> the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

Similarly, in his dissenting opinion in *Allegheny Co. v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), Justice Kennedy surveyed many of this Court's statements on hostility. In the process, he noted that:

> Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. *Lynch v. Donnelly*, *supra*, at 678; *Walz v. Tax Comm'n of New York City*, *supra*, at 669. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious. A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval. In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain

> the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

Allegheny Co., 492 U.S. at 657-58.

One opinion of this Court from which Justice Kennedy quoted in *Allegheny Co* is particularly worth repeating here:

> It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.
>
> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion . . . .

Abington Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

Hostility toward religion is no more permissible in the federal judiciary than it is in any other branch of the federal government or in state and local governments. In fact, it is even less acceptable, for it is the judicial branch that must adjudicate Establishment Clause disputes. No citizen in this

nation can expect proper results to such disputes if the federal judiciary is hostile toward religion.

Therefore, this Court should not adopt the test of a court of appeals panel that is by all appearances hostile to religion, to its own precedents, and to the precedents of this Court. (As we shall see below, whether it is hostile to the precedent of this court or not, it has in any event misapplied them.)

VI. THE PROBLEMS WITH THE SOLEMNIZATION TEST

Whether or not this distaste and hostility can be read between the lines, there is little doubt that the results are the same as if it exists. *Santa Fe* and *Clear Creek II* are in direct conflict. As noted above, this was the view of Judge Jolly and the six judges that signed on to his dissent from the Denial of Rehearing *En Banc*. *Doe v. Santa Fe Ind. Sch. Dist.*, 171 F.3d 1013 (1999). Judge Jolly wrote, "The majority opinions in *Santa Fe* and *Jones v. Clear Creek Independent Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), are so clearly in conflict with each other that school districts within our jurisdiction will have no guidance on how to interpret our confused precedent." *Id.* at 1015.

This adds to the appearance that the *Santa Fe* panel was hostile to the *Clear Creek II* decision and was determined to limit it to as narrow a field as possible. But the only way to do this was to ignore the principles that animate *Clear Creek II* and emphasize solemnization. As noted previously, the *Santa Fe* court wrote, "[t]he prayers are to be delivered *at football games*—hardly the sober type of annual event that can be appropriately solemnized with prayer." Santa Fe, 168 F.3d at 823 (emphasis in the original).

The *Santa Fe* court went on to write:

> Regardless of whether the prayers are selected by vote or spontaneously initiated at these

> frequently-recurring, informal, school-sponsored events, school officials are present and have the authority to stop the prayers. Thus, as we indicated in *Duncanville*, our decision in *Clear Creek II* hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek Prayer Policy cannot survive. We therefore reverse the district court's holding that SFISD's alternative Clear Creek Prayer Policy can be extended to football games, irrespective of the presence of the nonsectarian, nonproselytizing restrictions.

Id.

It is true that the *Santa Fe* court's reliance upon solemnization is traceable to the Fifth Circuit's decision in *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995). But at least in *Duncanville*, solemnization was just one of several factors the court looked at. Nonetheless, the seed was planted. To the extent that the *Duncanville* and *Santa Fe* courts emphasized that graduation is a unique event, they stood this Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992) on its head.

In *Lee*, the fact that graduation is a unique event weighed against the constitutionality of the prayers, not in its favor. As noted previously, Justice Kennedy wrote:

> These *dominant facts* mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are, in a fair and real sense, obligatory, though the school district does not require

> attendance as a condition for receipt of the diploma.

Id. at 586. If the constitutionality of prayers at graduation can be upheld after *Lee*, as they were in *Clear Creek II*, then prayers at less unique events should be less problematic, not more problematic. And a Policy that merely allows for the possibility of such prayers should be even less problematic.

Somehow, the *Duncanville* and *Santa Fe* courts not only misunderstood this Court's discussion of the significance of graduation in *Lee*, it also misconstrued what the *Clear Creek II* court said about solemnization of graduation. What the *Clear Creek II* court said was this: We accept Clear Creek ISD's assertion that solemnization was a secular purpose for the prayer and also found solemnization to be the primary effect. *Clear Creek II*, 977 F.2d at 966-67. What the *Clear Creek II* court did not say was this: the *only acceptable* secular purpose or primary effect is solemnization.

This points to the first major problem with *Santa Fe*'s solemnization test. The court ignored the other purposes offered by the Santa Fe ISD. The court acknowledged that the school district proffered the following purposes for pre-game message: "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." *Santa Fe,* 168 F.3d at 812 (quoting Santa Fe ISD's Football Prayer Policy). Yet every purpose except solemnization is completely missing from the court's analysis.

This bodes ill for any and every other event which involves any public facility, official, or other involvement. This Court should roundly declare that solemnization is not the only acceptable secular purpose nor primary effect. As long as this Court continues to use the much criticized test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), it should at least make it clear that *Lemon* will not be narrowed even further. *Any* secular purpose must continue to satisfy *Lemon's*

first prong in prayer cases, not merely the single secular purpose of solemnization.

However, there is a second problem with *the Santa Fe* court's solemnization test. On what grounds can the court say that football games cannot be solemnized? The grounds can only be one thing—the court's *opinion*. There is no legal principle involved here.

Surely different people can hold different views about this issue. Yet the *Santa Fe* court has declared *that as a matter of constitutional law*, football games cannot be solemnized. The Framers of our Constitution would be surprised to find any such principle lurking in their handiwork.

As amici noted at the beginning of this brief, all sorts of prayers are now at risk in this country. What other events may some other court now declare to be "hardly the sober type of . . . event that can be appropriately solemnized with prayer"? *Santa Fe,* 168 F.3d at 823.

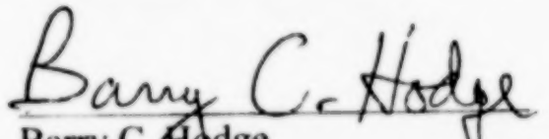
This is not what Establishment Clause jurisprudence should be about in this country. After all, as Justice Douglas said, in a much quoted passage from *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), "We are a religious people whose institutions presuppose a Supreme Being."

Therefore, this Court should flatly reject the "solemnization test" employed by the *Santa Fe* court. This Court should avail itself of this opportunity to strengthen and clarify its Establishment Clause jurisprudence. It should not approve *Santa Fe*'s jurisprudence of hostility. This Court should slam the door on a "jurisprudence" that is nothing more than judges' opinions as to what events they think are solemnizable.

CONCLUSION

For the foregoing reasons, the Fifth Circuit's decision should be reversed.

Respectfully submitted
this 29th day of December, 1999.



Barry C. Hodge
Counsel of Record for Amici Curiae
The National Legal Foundation
11521-E Midlothian Turnpike
Richmond, VA 23235
(804) 897-2340

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Supreme Court of the United States

OCTOBER TERM, 1999

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, ET AL.,

Respondents.

CORRECTED COPY

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* CONGRESSMAN STEVE LARGENT AND CONGRESSMAN J.C. WATTS IN SUPPORT OF PETITIONER

JOSEPH DORTA
NEW JERSEY LEGAL
RESOURCE COUNCIL
40 Baldwin Rd.
Parsippany, N.J. 07054
(973) 263-5258

BRETT M. KAVANAUGH
Counsel of Record
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5043

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QUESTION PRESENTED

Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.

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INTEREST OF AMICI CURIAE[1]

Congressman Steve Largent represents the First District of Oklahoma in the United States House of Representatives. Congressman J.C. Watts represents the Fourth District of Oklahoma in the United States House of Representatives. Both Mr. Largent and Mr. Watts played professional football; Mr. Largent is a member of the Hall of Fame.

Congress has substantial authority to enact legislation and vote on constitutional amendments regarding student religious speech, particularly in the Nation's public schools. *See generally Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). As citizens and Members of Congress, Mr. Largent and Mr. Watts have a deep interest in ensuring appropriate protection for student religious speech in our public schools and in preventing discrimination against religious organizations, religious persons, and religious speech. Mr. Largent and Mr. Watts thus have a strong interest in this case and submit that Santa Fe High School's religion-neutral policy for a brief student statement before varsity football games is entirely appropriate and consistent with the Constitution.

SCHOOL POLICY INVOLVED

The Santa Fe Independent School District in Galveston County, Texas, maintains the following policy for Santa Fe High School:

> The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and

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[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than the amici curiae and counsel made a monetary contribution to the preparation or submission of this brief. *See id.*

student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect *a student*, from a list of student volunteers, to deliver the statement or invocation. *The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.*

Pet. App. F1 (emphases added).

SUMMARY OF ARGUMENT

Santa Fe High School allows a student to make a brief statement to the crowd before home varsity football games "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Santa Fe High School's policy does not *require* or even *encourage* the student speaker to invoke God's name, to utter religious words, or to say a "prayer" of any kind. Nor, on the other hand, does the school policy *prevent* the student from doing so. The policy is thus entirely neutral toward religion and religious speech.

Respondents nonetheless claim that the school policy *on its face* violates the Establishment Clause because an individual student (not a school or government official) might invoke God's name, utter religious words, or say a prayer in his or her pre-game statement. Respondents' Establishment Clause theory directly conflicts with this Court's settled jurisprudence. The Court has held that the Establishment Clause permits a *neutral* school speech policy in which individuals may engage in religious or other speech as they see fit in a school forum. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515

U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). In these cases, the Court has stressed the critical distinction "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Rosenberger*, 515 U.S. at 841 (quoting *Mergens*, 496 U.S. at 250).

Similarly, in *Lee v. Weisman*, 505 U.S. 577 (1992), a case striking down *government*-led and *government*-composed prayer at school graduations, the Court repeatedly distinguished government religious speech from private religious speech. Indeed, in concurrence, Justice Souter, joined by Justices Stevens and O'Connor, foreshadowed and effectively answered in advance the question presented in this case: "If the State had chosen its . . . speakers according to wholly secular criteria, *and if one of those speakers (not a state actor) had individually chosen to deliver a religious message*, it would have been harder to attribute an endorsement of religion to the State." *Id.* at 630 n.8 (Souter, J., concurring) (emphasis added) (citing *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986)).

The Court's cases show, moreover, that respondents' theory of the Constitution is exactly backwards. If Santa Fe High School took steps to *prevent* the student speaker from invoking God's name or uttering religious words or saying a prayer in his or her pre-game statement, then the school *would* violate the Constitution – the Free Speech and Free Exercise Clauses of the First Amendment. The Constitution protects the Santa Fe student speaker who chooses to mention God just as much as it protects the Santa Fe student speaker who chooses not to mention God. The school cannot force the student to "say a prayer," nor can the school prohibit the student from "saying a prayer." By adhering scrupulously to this principle

of neutrality, the Santa Fe High School policy for pre-game student statements satisfies the Constitution.

As seven Justices indicated in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), the school need not issue any sort of "disclaimer" because this case involves an individual's verbal *speech* (in contrast to a case such as *Pinette* involving a *fixed* visual display in a public area). That said, we understand that a disclaimer is currently read over the public address system at Santa Fe High School football games. Given that fact and, in any event, given that this case involves a facial challenge, the Court can uphold the Santa Fe policy without considering whether and/or under what circumstances a school disclaimer ever might be necessary.

The forum's scarcity (namely, the fact that only one student per game speaks) does not alter the constitutional analysis. The Court explained in *Rosenberger* that "nothing" in the Court's decisions suggests that "scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." 515 U.S. at 835.

Finally, respondents' theory would cause severe practical harm. Schools would have to monitor and censor religious words by all non-governmental speakers (a high school football player in a pre-game pep rally, a student newspaper writer, the guest speaker at a school speakers' series, the valedictorian at graduation). This Court, however, has never forced or even allowed the public schools of this country to censor students and speakers who happen to be religious or wish to speak religious words at a school event. On the contrary, as the Court has said, the absolutist legal theory of those who seek to cleanse public school events of all *private* religious expression evinces a pervasive "hostility to religion" that is neither required nor permitted under the Religion Clauses. *Rosenberger*, 515 U.S. at 846.

ARGUMENT

I. A PUBLIC HIGH SCHOOL CONSTITUTIONALLY NEED NOT – INDEED, CONSTITUTIONALLY CANNOT – BAN A STUDENT'S RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM A SCHOOL EVENT.

Respondents do not dispute that a public high school may set aside a moment before a football game for a student to deliver a public message solemnizing the event, promoting good sportsmanship and student safety, and establishing the appropriate environment for the competition. The sole question is whether, as respondents submit, the high school must actively *prohibit* that student speaker from invoking God's name, uttering religious words, or saying a prayer.

A. This Court's First Amendment Jurisprudence Validates the School's Neutral Speech Policy.

Three mutually reinforcing strands of this Court's jurisprudence demonstrate that a public high school such as Santa Fe constitutionally need not (indeed, constitutionally *cannot*) prohibit the student from religious speech in his or her pre-game statement to the crowd.

First, the Court's cases striking down *government* school prayer have carefully distinguished governmental religious speech from protected private religious speech. *Second*, in a series of related cases, the Court has held that student religious speech in a school forum is not attributable to the State and therefore does not violate the Establishment Clause. Indeed, it is constitutionally impermissible for the government to discriminate against religion and prevent a student from engaging in religious speech at a school event. *Third*, the Court has similarly held that decisions by *private individuals* to use neutrally available government aid for religious purposes are not attributable to the State for purposes of the Establishment

Clause, a principle akin to the theory of neutrality employed in the student speech cases.

1. The Court has held that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayer in classes or at graduation ceremonies.[2]

The facts in the leading case, *Engel v. Vitale*, 370 U.S. 421 (1962), are well-known. A school board in New York had directed that teachers and students begin each school day with an official prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422. The Court struck down the policy, stating that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id.* at 425.

In concurrence, Justice Douglas emphasized a critical theme that would recur in the Court's decisions in subsequent years: "Under our Bill of Rights free play is given for making religion an active force in our lives. But if a religious leaven is to be worked into the affairs of our people, *it is to be done by individuals and groups*, not by the Government." *Id.* at 442-43 (Douglas, J., concurring) (quotation omitted; emphasis added).

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[2] The Establishment Clause generally does not prohibit governmental religious speech at *non-school* events so long as no one is compelled to speak or indicate agreement with the religious message. *See Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983); *see also County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring and dissenting). The examples of such governmental religious speech are pervasive and long-standing. The President issues Thanksgiving Day proclamations; this Court starts its sessions with a plea that "God save the United States and this Honorable Court"; both Houses of Congress begin the day with official prayer; the phrase "In God We Trust" adorns our currency; the list goes on.

"The First Amendment leaves the Government in a position not of hostility to religion but of neutrality." *Id.* at 443.

In *Lee v. Weisman*, 505 U.S. 577 (1992), the Court held that *Engel* applied to public school graduation ceremonies. The Court pointed to the following "dominant facts": The school had "decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." *Id.* at 586-87; *see also id.* at 588 (State made "decision to include a prayer"). Moreover, the school principal selected the clergy member and "directed and controlled the content of the prayers." *Id.* at 588. The degree of school involvement "made it clear that the graduation prayers bore the imprint of the State." *Id.* at 590. In concurrence, Justice Blackmun, joined by Justices Stevens and O'Connor, reiterated the critical facts: The "government composes official prayers, selects the member of the clergy to deliver the prayer, [and] has the prayer delivered at a public school event." *Id.* at 603 (Blackmun, J., concurring) (quotation omitted).

But the *Lee* Court cabined its holding in a way important to this case by stressing the critical distinction between (i) individual religious speech in schools, which is protected by the Constitution, and (ii) government-required religious speech in schools, which the Court held to be prohibited by the Constitution. The Court stated, for example, that "*the First Amendment does not allow the government to stifle prayers.*" *Id.* at 589 (emphasis added). The Court explained that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Id.*

The problem the Court identified in *Lee*, therefore, was not that students were exposed to religious speech, but that they were exposed to *governmental* religious speech. "In religious debate or expression the government is not a prime participant . . . . A *state-created orthodoxy* puts at grave risk

that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* at 591-92 (emphasis added). The First Amendment thus is not concerned with actions that do not "so directly or substantially involve *the state* in religious exercises or in the favoring of religion." *Id.* at 598 (quotation omitted; emphasis added).

Given that private individuals can engage in religious speech in school settings, the Court recognized that "there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." *Id.* at 598-99. But that is hardly some constitutional vice; to the contrary, it is a constitutional virtue. Indeed, the Court expressly warned that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Id.* at 598.

In a concurring opinion, Justice Souter, joined by Justices Stevens and O'Connor, elaborated by distinguishing the situation in *Lee* from a hypothetical policy that presumably would satisfy the Constitution (a policy that happens to be precisely akin to that employed by Santa Fe High School for football games): "If the State had chosen its graduation day speakers according to wholly secular criteria, *and if one of those speakers (not a state actor) had individually chosen to deliver a religious message*, it would have been harder to attribute an endorsement of religion to the State." *Id.* at 630 n.8 (Souter, J., concurring) (emphasis added) (citing *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986)).

The opinions and analyses of the *Engel* and *Lee* Courts foreshadowed – and effectively approved in advance – the Santa Fe High School policy at issue here. The Establishment Clause permits a student speaker to deliver a religious message in a neutrally available school forum, so long as the school

itself does not select, compose, deliver, or require a religious message.

2. We need not rely solely on statements in *Lee* and *Engel*, however, to support our argument. In a series of cases over the last two decades, the Court has held that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. Indeed, the Court has held that the Constitution *prohibits* the government from excluding private religious speech, because it is religious, from a school event.

These cases arose after certain schools and plaintiffs read *Engel* and other decisions as license (or judicial compulsion) to eradicate all traces of religion, *government and private*, from the public schools. The Court has rejected these homogenizing efforts to cleanse public schools of private religious expression, emphasizing time and again the critical distinction "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Rosenberger*, 515 U.S. at 841 (quoting *Mergens*, 496 U.S. at 250).

The cases affirming this dispositive principle are by now familiar: *Widmar*, *Mergens*, *Lamb's Chapel*, *Rosenberger*, and *Pinette*. Because of their importance to this case, we briefly review each.

In *Widmar v. Vincent*, the Court held that the Constitution "forbids a State to enforce certain exclusions [of religious speakers] from a forum generally open to the public, even if it was not required to create the forum in the first place." 454 U.S. 263, 267-68 (1981). A public university had justified its exclusion of religious speakers by citing the Establishment Clause as interpreted in *Tilton v. Richardson*, 403 U.S. 672 (1973), but the Court in *Widmar* reaffirmed "the right of religious speakers to use public forums on equal terms with

others." 454 U.S. at 273 n.12. As the Court stated, "by creating a forum the [State] does not thereby endorse or promote any of the particular ideas aired there." *Id.* at 272 n.10.

In *Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), the Court extended the principle of *Widmar* to the high school context – in a case where Congress through the Equal Access Act had mandated equal treatment of religious speech in public schools. A high school religious group sought permission to meet at the high school, as other groups did. The school denied the request, arguing that "official recognition of [the students'] proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students." *Id.* at 247-48. The Court, without dissent on the constitutional issue, rejected that Establishment Clause argument. The Court relied on the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 250 (plurality). The Court added that "*[t]he proposition that schools do not endorse everything they fail to censor is not complicated.*" *Id.* (emphasis added). And if a state "refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Id.* at 248 (plurality).

The Court reached the same conclusion in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). The Court struck down a school board rule that allowed schools to open their facilities except to religious uses. The Court unanimously concluded that the policy violated the Free Speech Clause and stated that "there would have been no realistic danger that the community would think that the

District was endorsing religion or any particular creed" by allowing religious uses in the school. *Id.* at 395.

The Court again relied on the neutrality principle in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). The University of Virginia authorized the payment of printing costs for a variety of student organization publications, but withheld payment for a religious group on the ground that the group's student paper "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." *Id.* at 823.

The Court first held that the University had engaged in impermissible viewpoint discrimination by excluding those "student journalistic efforts with religious editorial viewpoints." *Id.* at 831. As to the Establishment Clause analysis, the Court began with the "central lesson": A "significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Id.* at 839. In the speech context, the Court stated: "[M]ore than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Id.*

The Court found that a program including payments for expenses of the religious magazine as well as other student publications would be "neutral toward religion." *Id.* at 840. Such a program would respect the "critical difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 841 (quotation omitted); *see also id.* at 834 (speech of "private persons" and "University's own speech" controlled "by different principles"); *id.* (referring to "distinction between the University's own favored message and the private speech of students").

The Court applied those same principles of neutrality outside the educational context in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). The State there had excluded a private religious display (a cross) from a public square generally open to private displays.

The Court stated that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Id.* at 760. A plurality stated that the Establishment Clause "was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum." *Id.* at 767 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.).

In a concurring opinion, Justice Souter, joined by Justices O'Connor and Breyer, largely agreed with those principles, albeit finding that a state disclaimer might be necessary in cases of fixed visual displays. *Id.* at 784 (Souter, J., concurring). As to the need for a disclaimer, the concurring Justices distinguished a fixed visual display from an individual's verbal speech: "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." *Id.* at 786.

In sum, as this series of cases makes clear, state action prohibiting a student speaker from engaging in religious speech, because it is religious, is a First Amendment violation. But even if it were not a First Amendment free speech/free exercise violation to *exclude* religious speech, these cases show that it is surely not a First Amendment Establishment Clause violation for a school to *permit* religious speech on a neutral basis at a school event. As Justice Kennedy has explained, "in some circumstances the First Amendment may *require* that

government property be available for use by religious groups, *and even where not required, such use has long been permitted.*" *County of Allegheny v. ACLU*, 492 U.S. 573, 667 (1989) (Kennedy, J., concurring and dissenting) (citations omitted; emphasis added).

3. The principle that the government does not violate the Establishment Clause when it enacts a neutral program available to religious and non-religious alike finds additional doctrinal support in a separate strand of this Court's Establishment Clause jurisprudence. The Court has rejected challenges to government programs through which a "religious" individual or religious organization may take advantage of a neutrally available government benefit (the analytic equivalent of the neutrally available school speech forum). Four cases illustrate this principle.

In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court considered a tax deduction program that allowed deductions for school expenses, including for parents who sent their children to religious schools. Citing *Widmar*, the Court held that where religion is advanced only "as a result of decisions of individual parents 'no imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Id.* at 399 (quoting *Widmar*, 454 U.S. at 274).

The Court applied the same principle in *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986). The government provided financial assistance to blind students, one of whom used the assistance to attend a seminary. The Court, through Justice Marshall, stated: "Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion." *Id.* at 488-89.

Mueller and *Witters* laid the constitutional foundation for the Court's decision in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993). There, the school district provided

sign-language interpreters to students, but refused to provide them to students attending religious schools on the ground that the assistance would violate the Establishment Clause. The Court rejected that defense: "[T]he statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.* at 10.

Finally, in *Agostini v. Felton*, 521 U.S. 203 (1997), the Court relied on *Mueller*, *Witters*, and *Zobrest* in concluding that Title I's aid program did not violate the Establishment Clause. The Court held that the Constitution permits government aid to students on "a neutral basis" – aid available regardless whether the student attends a sectarian or non-sectarian school. *Id.* at 234-35. Such a program "cannot reasonably be viewed as an endorsement of religion." *Id.* at 235.

4. The decisions in *Widmar*, *Mergens*, *Lamb's Chapel*, *Rosenberger*, and *Pinette* – when read together with *Lee v. Weisman* and cases such as *Mueller*, *Witters*, *Zobrest*, and *Agostini* – establish two critical principles that speak directly to the issue in this case. *First*, the Establishment Clause permits a citizen or student or religious group to utilize a neutrally available school forum to speak religious words or invoke God's name or say a prayer. *Second*, if the government were to prevent citizens or students at a school event from religious speech, because it is religious, the government would violate the free speech and free exercise[3] rights of the speakers.

These principles, which validate the policy at issue in this case, should not be controversial. The President of the ACLU, for example, has correctly analyzed the issue presented here:

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[3] *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs").

> [T]he First Amendment would protect the right of a student speaker to voluntarily make religious statements even at a school-sponsored event. . . . [I]f the student were truly expressing his or her own views, that should be protected. Justice Souter made precisely this point in his concurring opinion in *Weisman*. . . . "If the State had chosen its graduation speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State."

Nadine Strossen, *How Much God in the Schools? A Discussion of Religion's Role in the Classroom*, 4 Wm. & Mary Bill Rts. J. 607, 631 (1995) (quoting *Lee*, 505 U.S. at 630 n.8 (Souter, J., concurring)).

B. A Disclaimer is Not Constitutionally Necessary Here; In Any Event, the Court Need Not Consider That Issue in the Context of This Facial Challenge.

This case involves a student's verbal speech at a school event, as opposed to a fixed visual display in a public square. As a result, the school need not issue a disclaimer to eliminate any claimed audience misperception of government endorsement of a student's private speech.

Seven Justices suggested as much in *Pinette*, with Justice Souter, joined by Justices O'Connor and Breyer, explaining the rationale in concurrence: "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." 515 U.S. at 786 (Souter, J., concurring). A four-Justice plurality added that the Court's "Religion Clause jurisprudence is complex enough without the addition of th[e] highly litigable feature" of sometimes-mandatory government disclaimers. *Id.*

at 769 n.4 (Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.).

That said, the Court in this case need not consider whether and/or under what circumstances a disclaimer ever might be necessary, for two reasons.

First, this is a facial challenge to the Santa Fe High School football game policy. The Court thus could uphold the school's policy against the facial attack and simply leave for another day the question whether and/or under what circumstances a disclaimer ever might be necessary. *See Pinette*, 515 U.S. at 784, 794 n.2 (Souter, J., concurring) (even a *fixed* display in the public square would not violate the Establishment Clause "in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it"; "there is no reason to presume that an adequate disclaimer could not have been drafted"); *Mergens*, 496 U.S. at 270 (Marshall, J., concurring) (voting to uphold program at issue in *Mergens* because school could allow private "religious speech" and affirmatively "disclaim[] any endorsement" of the private speech when necessary).

Second, and buttressing the first point, we understand that Santa Fe High School in fact issued the following oral disclaimer over the public address system at games after October 15 of this past season:

> Marian Ward, a Santa Fe High School Student, has been selected by her peers to deliver a message of her own choice. Santa Fe ISD does not require, suggest, or endorse the contents of Ms. Ward's choice of a pregame message. The purpose of the message is to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.[4]

[4] This statement is recited in an October 15, 1999, letter agreement between (continued...)

As the Court concluded in *Pinette* and *Mergens*, this kind of disclaimer, while not constitutionally necessary, would leave the audience (even the "unreasonable" listeners) with absolutely no doubt that the student's speech is not approved or endorsed by the government. *See Pinette*, 515 U.S. at 776 (O'Connor, J., joined by Souter and Breyer, JJ., concurring) ("In context, a disclaimer helps remove doubt about state approval of respondents' religious message."); *id.* at 769 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.) ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the square to be identified as such."); *id.* at 784 (Souter, J., joined by O'Connor and Breyer, JJ., concurring) ("I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it."); *Mergens*, 496 U.S. at 251 (plurality opinion of O'Connor, J.) ("To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, . . . students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.").[5]

In short, a disclaimer is *not* constitutionally required here. But given that this is a facial challenge and given the current practice at Santa Fe High School, the Court could leave for

[4] (...continued)
counsel in a separate case involving student pre-game speech at Santa Fe High School football games. *See Ward v. Santa Fe Independent School District*, No. G-99-556 (S.D. Tex., Houston Division). We have been informed that the letter agreement reciting that statement is part of the record in that case.

[5] In this case, moreover, any chance of widespread audience confusion is all but nonexistent given that the students themselves elect the speaker and are thus necessarily aware of the school policy.

another day the question whether and/or under what circumstances a disclaimer ever might be necessary.

C. The Scarcity of the Forum Does Not Alter the Constitutional Analysis.

The forum in this case is scarce, in the sense that only one student uses it at each home varsity football game, and there are only three to six home games a year. But the fact of scarcity does not alter the neutrality analysis.

First, as the Court in *Rosenberger* explained, the government's provision of a neutral forum does not suddenly become problematic if only a few speakers can utilize the forum. In such circumstances, it is "incumbent on the State . . . to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision [in *Lamb's Chapel*] indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." 515 U.S. at 835. The Court thus flatly rejected the suggestion that scarcity provided a rationale for discrimination against religious speech: "The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. Had the meeting rooms in *Lamb's Chapel* been scarce, had the demand been greater than the supply, our decision would have been no different." *Id.*

Justices Marshall and Brennan also helpfully analyzed the possible effects of scarcity in their separate opinion in *Mergens*. Considering the possibility of a forum that did not "include the participation of more than one advocacy-oriented group," 496 U.S. at 268 (Marshall, J., concurring), those two Justices still did not suggest that such a development would be unconstitutional. Rather, that fact would simply make the school responsible, they said, to "affirmatively disclaim any endorsement" of the private speech. *Id.*

Second, and this is important, the school here does not decide whether the speaker will utter religious words, nor does

the school premise availability of the forum on whether the speaker will utter religious words. The forum is neutral, and the choice whether to invoke God's name or speak religious words is within the sole discretion of the student.

Compare, by contrast, a situation where the government could allow only a single school group to meet on school grounds. Suppose that a number of clubs applied for the facility. Suppose further that the school chose a religious club – because it was religious – rather than allocating the scarce facility on a religion-neutral basis. In that case, an Establishment Clause issue would arise. In this case, however, the school has done nothing to favor or promote a speaker who may choose to speak religious words over a speaker who may choose not to speak religious words.

D. The Sole Issue Here is the Facial Constitutionality of a High School Policy That Permits, But Does Not Require, Student Religious Speech at Extracurricular Football Games.

The Court has stated that Establishment Clause jurisprudence is "delicate and fact-sensitive," *Lee*, 505 U.S. at 597, and that "[e]very government practice must be judged in its unique circumstances," *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring). In this case, that principle suggests particular attention to the following points.

First and most importantly, as we have already explained, this case involves a facial challenge to a student speech policy where the student is free to speak a religious message – *or not* – as he or she sees fit.

Second, as we have said, the Court could uphold the student speech policy without reaching the question whether and/or under what circumstances a disclaimer ever might be necessary.

Third, this case involves a high school. The Court need not consider whether the same principles would apply to elementary school events.

Fourth, the speech policy before the Court applies only to football games. A football game is extracurricular and more in the nature of a student event than are curricular, school-dominated events such as graduations and daily classes. While graduations and classes unmistakably bear "the imprint of the State," *Lee*, 505 U.S. at 590, extracurricular activities generally provide an opportunity for students to participate without the same degree of school control. To be sure, faculty advisors or coaches are important, but the football team, the debate team, the cheerleading squad, the newspaper, the yearbook, the school play are activities designed to give students an extra degree of freedom to grow and learn and err in a less autocratic, less structured environment. In short, the coercive, state-dominated atmosphere described in *Lee* simply does not translate to extracurricular events such as football games. *Cf. Mergens*, 496 U.S. at 267 (Marshall, J., concurring) ("To the extent that a school emphasizes the autonomy of its students, . . . there is a corresponding decrease in the likelihood that student speech will be regarded as school speech.").

II. RESPONDENTS' POSITION WOULD REQUIRE PUBLIC SCHOOLS TO ACT AS AGGRESSIVE "RELIGION CENSORS."

By allowing the student speaker to say what he or she chooses (so long as the message is within the very broad bounds of the school policy), the Santa Fe school district avoids entangling itself in the difficult task of determining what is religious speech and what is not. Respondents' position, by contrast, would generate enormous practical problems that only highlight the flaws in their argument.

If the student speaker must avoid "prayer," as respondents demand, does that mean all references to God? What about

references to the "Father"? The "Father above"? Must the student avoid a reference to "our Creator"? Can the student ask the crowd to observe a moment of silence for the crowd members "to pray" as they wish? Can the student refer to the afterlife? Can the student, without invoking God, use phrases that originated in the Bible? Is the word "bless" ok?

Who knows. What we do know is that the public schools – and then the courts – would have to monitor the private speech of individuals to make these and hundreds of other nuanced judgments and try to draw a line between religious and non-religious speech. But just as this Court is "ill-equipped to sit as a national theology board," *County of Allegheny*, 492 U.S. at 678 (Kennedy, J., concurring and dissenting), so too Santa Fe High School is ill-equipped to sit as a local Religion Censor, ordered by this Court to painstakingly eliminate all traces of private religious expression from its school. *See Mergens*, 496 U.S. at 253 (plurality) (denial of the forum to religious groups "might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); *cf. Lee*, 505 U.S. at 616-17 (Souter, J., concurring) (regarding judicial review of speech for sectarian influences: "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.").

And the school would need to play the role of Religion Censor not just at football games, but at all school events and gatherings. What to do about: A student running for student council who wants to say at a pre-election debate that the philosopher most influential to her was Jesus Christ and to explain why? A student at an awards banquet who wants to give thanks to God? A football captain who speaks to the team before the game and wishes to say a prayer and to ask God to bless the team? A student newspaper writer who wishes to write why his religion is important to him?

Logically at least, all are *prohibited* in respondents' Orwellian world. The schools throughout the country would have to review statements and messages at all school events to ferret out religious content. Schools would necessarily engage in "government censorship, to ensure that all student [speech] meet some baseline standard of secular orthodoxy." *Rosenberger*, 515 U.S. at 844. As the Court stated in *Rosenberger*, however, the "first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Id.* at 835.

There should be no mistake, then, about what's at stake here. If the theory advanced by respondents is to become enshrined in this Court's case law, the full extermination of private religious speech from the public schools would be well on its way. *See Adler v. Duval County School Bd.*, 174 F.3d 1236, 1256-57 (11th Cir. 1999) (Marcus, J., dissenting) ("[T]he majority opinion has come perilously close to pronouncing an absolute rule that would excise all private religious expression from a public graduation ceremony . . . .").

The Court should adhere to the principle of neutrality, avoid entangling schools in the review of student speech for religious words and influences, and uphold the Santa Fe policy.

III. THE SCHOOL POLICY SERVES LEGITIMATE PUBLIC PURPOSES.

The express purpose of the Santa Fe policy for football games is "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Pet. App. F1. Those are "legitimate secular purposes." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) ("solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society" are legitimate secular purposes).

The policy also provides an opportunity for the individual student speakers to express themselves publicly, thereby improving their own confidence and skills. And it allows the student speakers to seek unity within and reflection among the student body, thereby helping to heal some of the schisms and frustrations that inevitably develop in high schools. One need not reflect long on some of the horrific events in this country's public high schools in the past year to appreciate the desirability and validity of such goals.

The court of appeals did cast negative aspersions on the fact that the school policy states that the student may give a "message and/or invocation." But that language is neutral toward religious speech – and thus is entirely permissible. As Justice O'Connor explained in *Wallace v. Jaffree*, even if a "statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives." 472 U.S. 38, 73 (1985) (O'Connor, J., concurring). Thus, Justice O'Connor noted that a neutral moment of silence law "that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others," would pass muster. *Id.* at 76.

Chief Justice Burger and Justice White both concurred with Justice O'Connor's analysis on this point. Chief Justice Burger explained: "To suggest that a moment-of-silence statute that includes the word 'prayer' unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion." *Id.* at 85 (Burger, C.J., dissenting). The Chief Justice agreed with Justice O'Connor that it "makes no sense to say" that a state "endorse[s] prayer" by specifying that "voluntary prayer is *one* of the authorized activities." *Id.* And Justice White noted that the student who asked whether he can pray during a moment of silence must be told "yes," and "[i]f that is the case, I would not invalidate a statute that at the outset

provided the legislative answer to the question, 'May I pray?'" *Id.* at 91 (White, J., dissenting).

As Justice O'Connor suggested in *Wallace*, it would be a bizarre rule, to put it charitably, that condemned a school policy where a student could give a "message and/or invocation," but allowed a policy where a student could give a "message" – when in fact the student was free under both policies to speak religious words. If the Constitution turned on such a strange distinction, the school here surely would re-adopt its policy without the word "invocation" and then school officials would spend their time answering "yes" to students asking whether they could utter religious words. That makes no sense, as the three Justices who addressed the issue concluded in *Wallace*.

In that regard, we note that the five-Justice majority opinion in *Wallace* never said that inclusion of the word "prayer" as a mere alternative rendered the Alabama statute unconstitutional. Rather, there was "unrebutted evidence of legislative intent," *id.* at 58 – evidence that "ma[de] it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words 'or voluntary prayer' to the statute." *Id.* at 61.

Santa Fe's policy carefully follows the path charted by Justice O'Connor in *Wallace*. The policy's neutral phrase "message and/or invocation" makes clear that the student *may* – but need not – choose to invoke God's name or speak religious words.

But "the neutral language is itself skewed," respondents no doubt will argue. To begin with, such a suggestion borders on the incoherent, particularly in the context of a facial challenge. More to the point, a fundamental problem to which student speech policies such as Santa Fe's must respond is that many people have misread *Engel* and *Lee v. Weisman* to require the wholesale elimination of religious speech – *even private religious speech* – from the public schools. Indeed, the Court

can take judicial notice of the fact that those cases led to such widespread misinterpretation by public school officials that the President in 1995 ordered the Secretary of Education to distribute guidelines nationwide explaining that student religious speech is not only permitted, but protected, in public schools. *See* Secretary Riley's Statement on Religious Expression, http://www.ed.gov/Speeches/08-1995/religion.html (May 1998) ("The purpose of promulgating these presidential guidelines [in 1995] was to end much of the confusion regarding religious expression in our nation's public schools . . . . Schools may not discriminate against private religious expression by students . . . .").

The Santa Fe policy also combats that widespread misinterpretation by clarifying in a neutral way that religious speech is simply an alternative that is permitted, but not required, from student speakers at football games – akin to what the presidential guidelines stated and this Court held in *Widmar*, *Mergens*, *Lamb's Chapel*, and *Rosenberger*.

IV. CONJURING UP SOME FUTURE "PARADE OF HORRIBLES" IS NOT A BASIS FOR STRIKING DOWN THE POLICY ON ITS FACE.

Respondents may suggest that most speakers at football games ultimately will choose to say religious words. But in this facial challenge to the policy, with no record to analyze, there is no basis to assume that the forum in fact will be used primarily by speakers employing religious words. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). The Court here has only to determine "whether it is possible for the [policy] to be implemented in a constitutional manner." *Mergens*, 496 U.S. at 260 (Kennedy, J., concurring); *see also Bowen v. Kendrick*, 487 U.S. 589, 612 (1988).

In any event, if most speakers express religious words, that development could raise (at most) claims of audience confusion over whether the government had somehow encouraged or

endorsed religion. Of course, a disclaimer making clear that the private speech is not approved or endorsed by the state, while not constitutionally necessary with respect to an individual's verbal speech, *see Pinette*, 515 U.S. at 786 (Souter, J., concurring), would eliminate any conceivable problem, *see Mergens*, 496 U.S. at 266-70 (Marshall, J., concurring).

There is a more direct and persuasive answer, however, to this kind of argument. The fact that some percentage (even 100%) of the speakers at a public school event may choose to engage in religious speech in a neutrally available forum cannot be a constitutional problem any more than if 100% of government workers donate a portion of their salaries to religious organizations. *Cf. Witters*, 474 U.S. at 486; *see also Agostini*, 521 U.S. at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."); *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

Consider the following practical example of the problems with this kind of approach: If High School A has events where 10% of the students utter religious words, High School B holds events where 50% of the students utter religious words, and High School C has events where 95% of the students utter religious words, what result? Do the percentages matter? Do the *relative* percentages matter? How? Does High School C have to tell some students to stop speaking religious words? Which ones? (And what exactly are sufficiently "religious words" to use in making this calculation, in any event?)[6]

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[6] Respondents may also raise the specter that school officials will in fact coerce students into providing religious messages. If so, that will provide (continued...)

V. THE COURT'S PRECEDENTS HAVE LONG FOUND GOVERNMENT NEUTRALITY TOWARD RELIGION CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

In Establishment Clause cases, the search for an overarching test is not always necessary, *see Lee*, 505 U.S. at 586, and can sometimes be counterproductive or even harmful, *see Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring) ("Any test that must deal with widely disparate situations risks being so vague as to be useless. . . . *Lemon* has, with some justification, been criticized on this score.").

The Court, of course, has been closely and deeply divided regarding the appropriate test and way to analyze government practices (i) that favor or promote religion over non-religion and (ii) that are deeply rooted in our history and tradition. *See Lee*, 505 U.S. at 632 (Scalia, J., dissenting) (decision "lays waste a tradition that is as old as public-school graduation ceremonies themselves"); *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring and dissenting) ("A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."); *Lynch*, 465 U.S. at 674 (upholding government's nativity display: "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."); *Marsh*, 463 U.S. at 792 (legislative prayer constitutional because it has become "part of the fabric of our society"); *Engel*, 370 U.S. at 446 (Stewart, J.,

---

[6] (...continued)
occasion for an as-applied challenge to the school's implementation of its policy. *See Bowen*, 487 U.S. at 618-21; *Pinette*, 515 U.S. at 766 (plurality opinion of Scalia, J.) (discussing hypothetical applications where a "governmental entity manipulates its administration of a public forum").

dissenting) ("What is relevant to the issue here is . . . the history of the religious traditions of our people . . . .").

But those deep juridical divisions about the proper Establishment Clause "test" and analysis have by and large disappeared – or been muted as irrelevant – when the Court has analyzed laws *neutral* toward religion in cases such as *Widmar*, *Mergens*, *Lamb's Chapel*, and *Witters*. As Justice Thomas has explained, while the Court's Establishment Clause jurisprudence arguably is "in hopeless disarray" in several areas, the principle that government neutrality satisfies the Establishment Clause "has enjoyed an uncharacteristic degree of consensus." *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring). No matter what Establishment Clause test might be employed, the Court generally has held that a law neutral toward religion satisfies Establishment Clause scrutiny (with a limited exception not relevant to this case[7]).

It is true, of course, that some citizens hostile to religion in any form may argue that even government neutrality toward private religion is still "too favorable" toward religion. These citizens may not want to see private displays of religion in the open public square (as in *Pinette*), to hear private individuals express religion in the public square (as here), to read religious speech as an expressly listed alternative in a student speech policy, to know that religion is obtaining taxpayer-funded assistance on a neutral basis (as with police and fire protection for churches), to see places of worship built alongside other buildings in residential communities (as most zoning ordinances allow). Some citizens may want to be free of

---

[7] The Court has suggested that neutrality may not suffice in that limited class of cases where government monies in a neutral benefits program would go directly to religious institutions. Of course, that exception is of questionable validity and is inconsistent with the thrust of the Court's modern jurisprudence establishing neutrality as an Establishment Clause safe harbor. *See Rosenberger*, 515 U.S. at 852-63 (Thomas, J., concurring). But this case, in any event, does not involve a funding program.

private religious speech and organizations just as much as they want to be free from the *government's* "exercise of religion." But offense at one's fellow citizens is not and cannot be the Establishment Clause test, at least not without relegating religious organizations and religious speakers to bottom-of-the-barrel status in our society – below socialists and Nazis and Klan members and panhandlers and ideological and political advocacy groups of all stripes, all of whom may use the neutrally available public square and receive neutrally available government aid.

The Religion Clauses, of course, do not require any such "hostility to religion, religious ideas, religious people, or religious schools." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring). On the contrary, the Constitution, this Court's precedents, and our traditions demand that government accord religious speech, religious people, and religious organizations *at least* the same treatment as their secular counterparts. This Court therefore has stated time and again, and often unanimously, that government neutrality toward religion – meaning no discrimination between religious and non-religious organizations, people, and speech – is not an Establishment Clause violation. Striking down a law neutral toward religion, the Court has said, would reflect the "hostility to religion" that the Constitution neither requires nor permits. *Rosenberger*, 515 U.S. at 846, *see generally* Eugene Volokh, *Equal Treatment is Not Establishment*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341 (1999).

Respondents ask this Court to ignore the neutrality of the school policy and, as a necessary result, to cleanse public schools throughout the country of *private* religious speech. The Court should reject respondents' submission and affirm, as it has done many times before, that a neutral government policy of the kind maintained by Santa Fe High School satisfies the Establishment Clause.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

JOSEPH DORTA
NEW JERSEY LEGAL
RESOURCE COUNCIL
40 Baldwin Rd.
Parsippany, N.J. 07054
(973) 263-5258

BRETT M. KAVANAUGH
Counsel of Record
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5043

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In The

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, Individually and as next friend for her minor children, Jane and John Doe, Minor Children; Jane Doe #2, Individually and as next friend for her minor child, John Doe, Minor Child, and John Doe, Individually,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE THE TEXAS JUSTICE FOUNDATION AND LISTED STUDENTS, PARENTS, TEACHERS, LEGISLATORS, AND BLANCO INDEPENDENT SCHOOL DISTRICT AS AMICI SUPPORTING PETITIONER

LINDA L. SCHLUETER
Texas Bar No. 24000127
8122 Datapoint, Suite 812
San Antonio, TX 78229
Phone: 210-614-7157
Fax: 210-614-6656

Counsel of Record
for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTION PRESENTED

Whether Petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause?

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BRIEF OF AMICI CURIAE TEXAS JUSTICE FOUNDATION AND OTHERS IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, amici curiae submit this brief in support of the Petitioner.[1]

INTEREST OF THE AMICI CURIAE

Texas Justice Foundation

The Texas Justice Foundation is a 501(c)(3) non-profit organization which provides free legal representation in landmark cases involving limited government, free markets, parental rights and private property rights. The Foundation seeks, through litigation and education, to protect the fundamental freedoms essential to the preservation of American society. The Foundation is deeply concerned about the free speech rights and free exercise of religious expression of students in the State of Texas.

Beth Long

Beth Long is the Student Body President at her high school in Mission, Texas. Due to the Fifth Circuit decision below, Ms. Long was not allowed to lead a prayer as part

[1] All of the parties have consented to the filing of this Amicus Brief. A joint letter of consent has been filed with the Clerk's Office consenting to the filing of amicus briefs. No counsel for either party authored this amici curiae brief, either in whole or in part. Furthermore, no persons other than amici curiae and their counsel contributed financially to the preparation of this brief.

of her opening address at the football games for the 1999 football season, though elected by her fellow students to do so. She was threatened that if she attempted to lead her fellow students in a prayer as part of her opening address she would lose her position as Student Body President. Ms. Long gave up the privilege of giving the opening address and instead went to the center of the football field at the start of the games with representatives of the Fellowship of Christian Athletes to voluntarily pray before the game. Ms. Long believes that as Student Body President she has the right to lead her fellow students in a voluntary prayer.

Students

The following are Texas high school students who have been adversely affected by the Fifth Circuit decision below. These students feel a deep sense of loss from not being allowed to have their traditional right of religious expression allowed before their football games and other sporting events. These students believe that a student has the right to lead other fellow students in a student initiated, voluntary prayer.

Robin Airheart
Beverly Anderson
Michael Barranco
John Bedford
Britney Kay Buchanan
Kyle Dahlberg
Sean Desha
Justin Dorsey
Shalin Eddy
Michelle Friesenhahn
Julie Garcia
Courtney Glover
Sarah Szuminski
Lauren Talbert
Kristen Thomas
Matt Glover
Ben Guenther
Ellen Hamner
Melissa Hamner
Lauren Hess
Nels Jacobson
Amy Kritt

Lauren Lawson
Jennifer Leman
Matt Lusk
Drew Lusk
Charlie Malmberg
Theresa C. Vela
Rochelle Villafranca
Adam Ward
Seth McKinley
Bo Mechinus
Steven Nason
Tanya Sammis
J.B. Sigmon
Stephanie Slate
Krystal Slate
Rebecca Smith
Danielle Smith
Kawika Solidum
Karen Stewart
Kacee Surratt
Katie Wheeless

Parents

The following are parents of students in the Texas public school system that have been adversely affected by the Fifth Circuit decision below. These parents are very concerned about their children's rights to free speech and the free exercise of religious expression and they feel that these rights are being violated by the underlying Fifth Circuit decision. They feel that their children have the constitutional right to voluntarily pray before football games and other sporting events and to be led by a fellow student elected by the students in this prayer.

Jamie Abernathy
Linda Albers
Bill Bedford
Jeanne Bedford
Roger Edward Belveal
Glenda Beyer
Ronnie Bless
Isabelle Bless
Michael Bliss
Patricia Bodiford
Billy Bodiford
Blanca Bonner
Lushile Bruchmiller
Rhonda Bustos
Sherrie Carey
Betty Clark
Judy Desha
Scott Desha
Ashley Desha
Susie Escamilla
Rebecca Hamner
Tina Harrell
Yvette Hernandez
Richard Hillyard

Sandra Hyatt
C. Leroy Jacobson
Rebecca Landis
Larry Lawson
Sheila Lawson
Don Long
Darrel McMaster
Margaret Mechinus
Henry Medrano
Amy Medrano
Patricia Ormond
Richard Ormond
Rene Palmer
Cynthia Rodriguez
Lee Roscoe
Donna F. Russell
A. Wayne Russell
Ruby Stotts
Bill Talbert
Debbie Talbert
Jerri Lynne Tanner
Debra Temple
Greg Temple
Billie Thomas
Donald Thomas
Raelyn Van Pelt
Karen Warren
Paul G. Wilke
Constance Wilke

Teachers

The following are teachers in the State of Texas who support the constitutional rights of their students to free speech and the free exercise of religious expression. They believe, as teachers, that allowing students the free exercise of religious expression creates a better academic and social environment for all their students. It promotes tolerance, respect for authority and love of others. They support the First Amendment. These teachers believe that government can neither mandate nor censor values, and therefore, they are in support of this Amicus Brief.

Lisa Caffey
Karen Eisenhauer
Michele Gonyer-Russell
Esther Heiligman
Donna Legenorg-Hofmann
Glenna Roscoe
Mitchell Silvia
Melissa Vinez
Janice Whitwell

Blanco Independent School District

Blanco Independent School District is a school district in the State of Texas. The district is responsible for

writing policies for the schools within the district. The district feels it has a constitutional obligation to protect the religious liberty and free speech rights of students and therefore has an interest in the underlying case.

Legislators

The following are State Legislators in the State of Texas who are deeply concerned about the free speech rights and free exercise of religious expression of their constituents.

Representative Leo Berman
Representative Kim Brimer
Representative Betty Brown
Representative Frederick Brown
Representative Wayne Christian
Representative Ron Clark
Representative Frank Corte, Jr.
Representative Dianne Delisi
Representative Tony Goolsby
Representative Rick Green
Representative Kent Grusendorf
Representative Richard Hardcastle
Representative Will Hartnett
Representative Harvey Hilderbran
Representative Bob Hunter
Representative Carl Isett
Representative Phil King
Representative Mike Krusee
Representative Jerry Madden
Representative Ken Marchant
Representative Geanie Morrison
Representative Gene Seaman
Representative John Shields
Representative John Smithee

Representative Todd Staples
Representative Robert Talton

SUMMARY OF THE ARGUMENT

I.

Like all Americans, students have religious liberty because they do not shed their constitutional rights at the schoolhouse gate. Allowing students to exercise their religious rights is not an establishment of religion because it is student-initiated and student-led prayer. Invocations or messages that are not scripted, supervised, endorsed, suggested, or edited by the school pass constitutional muster. The danger created by *Santa Fe v. Doe* is that school officials will feel that they must censor or edit this speech to insure that it is nonsectarian and nonproselytizing. Viewpoint discrimination and censorship have been strongly condemned by this Court because they are unconstitutional and violate the religious liberty of students. Furthermore, removing all religion from the public schools would create an environment of anti-religion or atheism. Promoting atheism is not consistent with either the intent of the Founding Fathers or the principle of neutrality. Student-led, student-initiated prayer at football games does not violate the Establishment Clause, and therefore, the lower court's decision should be reversed.

II.

The Establishment Clause and the Free Exercise Clause of the First Amendment should be read in harmony because they share a common purpose to secure

religious liberty. The two religion clauses must be properly balanced or else government neutrality becomes government hostility toward religion. Suppression of student-initiated and student-led religious speech is not necessary to meet constitutional standards nor does it achieve constitutional neutrality of religion. In fact, it demonstrates a hostility toward religion which is unconstitutional. Student-initiated, student-led religious speech is constitutional because it strikes a proper balance between the Establishment Clause and the Free Exercise Clause, and therefore, an invocation, message, or prayer should be allowed in this case.

ARGUMENT

I. PETITIONER'S POLICY PERMITTING STUDENT-LED, STUDENT-INITIATED PRAYER AT FOOTBALL GAMES PASSES CONSTITUTIONAL MUSTER UNDER THE ESTABLISHMENT CLAUSE.

In 1969 during the heat of the Vietnam protests, this Court correctly articulated the principle that students do not shed their rights at the schoolhouse gate. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). Furthermore, a student's religious speech does not become forbidden "state action" when the student walks through the schoolhouse door. *Chandler v. James*, 180 F.3d 1254, 1261-62 (1999).

Over the last thirty years, this Court has had the opportunity to analyze numerous cases concerning students' religious rights. *Santa Fe ISD v. Doe* has confused the issues and created great concern by students, parents,

teachers, school districts, and legislators as they struggle to comply with the law while allowing students to exercise their religious rights and liberty. Petitioner's policy permitting student-led, student-initiated prayer at football games does not violate the Establishment Clause.

A. Allowing the Free Exercise of Religion Is Not an Establishment of Religion, and Therefore, Student-Led, Student-Initiated Prayer Merely Allows Students to Express Their Religious Views.

Allowing students, either inside or outside the school building, to express their views on religious ideas is not an establishment of religion. *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990); *Chandler v. James*, 180 F.3d 1254, 1258 (11th Cir. 1999). Having a policy that allows students to voluntarily give a message or invocation merely keeps the government from discriminating against students based on their particular viewpoint, whether religious or secular. In its prior rulings, this Court has cleansed the public school forum from any government-sponsored, government-initiated prayer or religious speech. *See, e.g.*, *Lee v. Weisman*, 505, U.S. 577 (1992) (finding violation where school selected the clergyman who was a rabbi); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (finding school reading Bible verses over the intercom was unconstitutional as state action); *Engel v. Vitale*, 370 U.S. 421 (1962) (finding school prayer that was directed by and composed by the Board of Education was unconstitutional as state action); *McCollum v. Board of*

Education, 333 U.S. 203 (1948) (finding religious instruction in public schools a violation of the establishment clause as state action).

In the Santa Fe ISD policy, everything was student initiated or led without any direction from school officials. *Doe v. Santa Fe ISD*, 168 F.3d 806, 811 (5th Cir. 1999). The students selected the individual who would give the message or invocation. *Id.* That student composed the message or invocation and that student voluntarily gave the message or invocation without coercion or endorsement by the school. As Judge Jolly correctly concludes in his dissent, it is constitutional where "school policy is the neutral accommodation of non-coerced, private, religious speech, which allows students, selected by students, to express their personal viewpoints. The state is not involved. The school board has neither scripted, supervised, endorsed, suggested, nor edited these personal viewpoints." *Doe v. Santa Fe ISD*, 168 F.3d 806, 835 (5th Cir. 1999) (Jolly, J. dissenting) *accord Doe v. Duncanville ISD*, 70 F.3d 402, 404-05 (5th Cir. 1995) (delineating between school-sponsored religious activities and student-led activities).

In the lower court opinion, the court characterized the situation by stating that "SFISD allowed students to read overtly Christian prayers from the stage at graduation ceremonies and over the public address system at home football games." *Doe v. Santa Fe ISD*, 168 F.3d 806, 810 (5th Cir. 1999). The key word in this characterization is that the school district allowed such speech. The school district did not script, supervise, endorse, suggest, or edit the personal views of the student before the football game, and therefore, it passes constitutional standards.

Part of the problem that this case and others have created is a fear on behalf of the schools that they must censor or edit what the student is going to say. This type of activity definitely violates the constitutional standard. When government feels compelled to review, edit, and/or censor the religious or political speech of students, it has trampled on the most sacred of the our constitutional rights. How can the Constitution be interpreted to require the government to censor speech? The Constitution does not require the government to censor its people. Quite the contrary, it requires that the government allow the free exercise of religious and other types of speech even if that speech may be offensive to some.

The lower court's opinion which requires a nonsectarian, nonproselytizing message places the school district in the position of being government censor. Such behavior by the government is unconstitutional and violates the religious liberty of its students. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). This Court strongly condemned such conduct stating that "Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829. Indeed, this is exactly what transpired when school officials "screened" the text of the graduation invocations and benedictions for content prior to the ceremony. *Doe v. Santa Fe ISD*, 168 F.3d 806, 810 (5th Cir. 1999).

There are members of the *Amici* that have also faced this type of censorship. For example, Beth Long is student body President at Mission High School. In that

capacity, she was selected to give the welcome address and invocation before the football games. School officials read, edited, and censored some of the language that was in her welcome address and invocation because of the religious content. She was then advised that if she proceeded with the original message and invocation, she would be stripped of her position. This Christian student was then forced to either give up her position or the expression of her religious beliefs. This is a choice that no American should have to make. The Texas Justice Foundation believes that her constitutional rights were violated and that there was egregious content discrimination. Student-led, student-initiated religious speech does not violate the First Amendment.

The principle of neutral accommodation is fully consistent with this Court's recent pronouncements. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 587 (1992) (recognizing that schools may accommodate the free exercise of religion, but finding a violation in that case because the school selected the clergyman who was a rabbi); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 842 (1995) (finding the government must be neutral and may accommodate a wide spectrum of student groups including those with sectarian activities), and *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 13-14 (1993) (upholding a neutral government program giving aid to individual handicapped children which can be used in a sectarian school).

Petitioner's policy permitting student-led, student-initiated prayer at football games does not violate the Establishment Clause. Messages or invocations that are student-led and student-initiated comport with this

Court's rulings concerning the First Amendment. Neutrality would require that if one student may select a non-religious message at a football game then another student may select a religious message without the government censoring or editing the speech.

B. Permitting Voluntary Messages or Invocations Is Also Consistent with the Intent of the Founding Fathers.

When deciding Establishment Clause cases, the intent of the Founding Fathers is important to properly interpret the case. Justice Brennan has stated that the Court's decision must be one that "accords with history and faithfully reflects the understanding of the Founding Fathers." *Walz v. Tax Commission*, 397 U.S. 664, 680 (1970) (Brennan, J., concurring). This is a principle that he had articulated some years earlier stating "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment." *School District of Abington Township v. Schempp*, 374 U.S. 203, 294 (1962) (Brennan, J., concurring).

Chief Justice Rehnquist makes this point even more strongly and suggests the ramifications of failing to do so when he states: "The true meaning of the Establishment Clause can only be seen in its history. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead

to the type of unprincipled decision-making that has plagued our Establishment Clause cases since *Everson*." *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J. dissenting).

Over the years, there has been much discussion about the intent of the Founders. Chief Justice Rehnquist provided one of the more detailed discussions in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J. dissenting). The words of the Founders provide compelling evidence of their intent and the following are a few examples. For a detailed discussion, *see generally* David Barton, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, AND RELIGION ch. 2 (1998); T. Jeremy Gunn, A STANDARD FOR REPAIR ch. 2 § B (1992).

George Mason, who was a member of the Constitutional Convention and called the "Father of the Bill of Rights" indicated: "[A]ll men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience; and that no particular sect or society of Christians ought to be favored or established by law in preference to others." 1 Kate Mason Rowland, *The Life of George Mason* 244 (1892).

James Madison proposed: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established . . . " 1 *The Debates and Proceedings in the Congress of the United States* 451 (James Madison, June 8, 1789) (Gales & Seaton, eds. 1834). During the debates, Madison believed that if the word "national" was inserted before religion, it would "point the amendment directly to the object it was intended to prevent." *Id.* at 758-59.

Justice Story emphasized the concern about a national religion stating: "We are not to attribute this [First Amendment] prohibition of a national religious establishment to an indifference to religion in general, and especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution) . . . " Joseph Story, *A Familiar Exposition of the Constitution of the United States* 259 (1854).

The House and Senate Judiciary Committee Reports contained similar statements concerning the meaning of the establishment of religion. For example, the Senate Judiciary Committee emphasized that the Founders intended to prohibit an establishment of religion such as the English Church. They had "no fear or jealousy of religion itself, nor did they wish to see us an irreligious people . . . " *The Reports of Committees of the Senate of the United States*, 32nd Cong., 2nd Sess. at 1-4 (Robert Armstrong, ed. 1853) (*quoted in* David Barton, Original Intent: The Courts, The Constitution, and Religion 30-31 (1998)).

Justice Story writes in his Commentaries on the Constitution: "The real object of the [First A]mendment was . . . to exclude all rivalry among sects and to prevent any national ecclesiastical establishment which should give to a hierarchy [a denominational council] the exclusive patronage of the national government." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1871 at 728 (1833).

Thus, the Founding Fathers intended that a national religion such as they had experienced in England with the Church of England was prohibited. In addition, the

Founders did not want one particular religious denomination or sect to have preference over another. "As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means." *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J. dissenting).

A message or invocation that is student-initiated and student-led does not violate the original intent of the Founding Fathers. Such public prayer would be encouraged and was in fact practiced as evidenced by the fact that the Congress that passed the Bill of Rights was the one that asked George Washington to proclaim a day of public thanksgiving and prayer to acknowledge what God had done for them. Voluntary public acknowledgement of God's guidance and blessings is still needed today.

In a cover letter to American Educators, United States Secretary of Education Richard W. Riley summarized this issue by stating:

> Finally, I encourage teachers and principals to see the First Amendment as something more than a piece of dry, old parchment locked away in the national attic gathering dust. It is a vital living principle, a call to action, and a demand that each generation reaffirm its connection to the basic idea that is America – that we are a free people who protect our freedoms by respecting the freedom of others who differ from us.

Our history as a nation reflects the history of the Puritan, the Quaker, the Baptist, the Catholic, the Jew, and many others fleeing persecution to find religious freedom in America. The United States remains the most successful experiment in religious freedom that the world has ever known because the First Amendment uniquely balances freedom of private religious belief and expression with freedom from state-imposed religious expression.

Public schools can neither foster religion nor preclude it. Our public schools must treat religion with fairness and respect and vigorously protect religious expression as well as the freedom of conscience of all other students. In so doing our public schools reaffirm the First Amendment and enrich the lives of their students. Letter from United States Secretary of Education Richard W. Riley to American Educators at 4 <http://www.ed.gov/speeches/08-1995/religion.html>

The First Amendment is a vibrant, living document which stands vigil against government censorship or discrimination. The danger of attempting to rid all religion from the public schools is that the government would create an environment of anti-religion. *See Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). " . . . [N]othing in the Establishment Clause requires government to be strictly neutral between religion and irreligion . . . " *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J. dissenting).

Justice Douglas, writing the opinion in *Zorach*, summarized these principles as follows:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

The American people are a religious people who want to express their religious beliefs. For example, it is reasonable to assume that if there were a room full of 100 students who were allowed by the government to freely discuss any subject, some would talk about politics, sports, religion, and a wide variety of other topics. Students should be allowed to express their opinions and beliefs about such topics without fear of government censorship or discrimination. The First Amendment provides freedom *of* religion and not freedom *from* religion. Thus, students should be allowed to express their religious views when it is purely voluntary, student-initiated, student-led speech.

Government must not show a callous indifference to religious groups. Nor must it favor or give preference to non-religion. To do so would violate the Establishment Clause by favoring or sponsoring atheism or disbelief of God instead of a belief in God. The Constitution requires neutrality, and therefore, the government may not prefer disbelief over religion. *Chandler v. James*, 180 F.3d 1254, 1261 (11th Cir. 1999). "Tolerance of disbelief does not require that we deny our religious heritage, nor elevate atheism over that heritage." *Id.* at 1261 n.11. The constitutional requirement is that the government tolerate both while establishing neither. *Id.*

Our Founding Fathers were a religious people who were frustrated by the lack of religious liberty in England. Feelings of frustration and disenfranchisement led to chaos and revolution for the sake of religious liberty. The Founding Fathers expected that their faith would be carried on by future generations who would have secured religious liberty by the protections of the First Amendment. Likewise, the student Amici are religious students who feel a deep sense of frustration and loss concerning the limitations on religious liberty, and therefore, they are asking that government maintain a stance of neutral accommodation of their religious beliefs.

II. THE ESTABLISHMENT CLAUSE AND THE FREE EXERCISE CLAUSE SHOULD BE READ IN HARMONY BECAUSE THEY SHARE A COMMON PURPOSE TO SECURE RELIGIOUS LIBERTY.

This Court has been unanimous on the principle that the common purpose of the two religion clauses is to

secure religious liberty. *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J. concurring). Although unanimous on the purpose of the two clauses, the courts have struggled to balance the requirements of the Establishment Clause with the Free Exercise and Free Speech Clauses. Wenkart, *Prayer in School: Can a Solution Be Found?* 138 Ed. Law Rep. 597, 597 (Dec. 1999).

Unless there is a proper balance between the religion clauses, government neutrality becomes government hostility toward religion. *Chandler v. James*, 180 F.3d 1254, 1261 (11th Cir. 1999). Suppression of student-initiated and student-led religious speech is not necessary nor does it achieve constitutional neutrality of religion. *Id.* In fact, discriminatory suppression of student-initiated and student-led religious speech demonstrates a hostility toward religion which is unconstitutional. *See School District of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J. concurring).

Without a proper balance, government would have a callous indifference that was not intended by the Establishment Clause and government would be at "war with our national traditions as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum v. Board of Education*, 333 U.S. 203, 211-12 (1948).

In striking this balance, there is no constitutional violation even if students are freely advancing religion. *See Chandler v. James*, 180 F.3d 1254, 1262 (11th Cir. 1999). This Court has recognized that not every law that confers

an indirect, remote, or incidental benefit is constitutionally invalid. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973). Thus, even if students are vigorously advancing their religion, it does not violate the Establishment Clause because it is student-initiated, student-led religious speech which is protected by the Free Exercise and Free Speech Clauses. *Chandler v. James*, 180 F.3d 1254, 1263 (11th Cir. 1999).

Student-initiated, student-led, religious speech is constitutional because it strikes a proper balance between the Establishment Clause and the Free Exercise Clause. The government in this case did not establish, endorse, coerce, censor, or edit student speech, and therefore, it meets the constitutional standards. Furthermore, individuals are allowed to exercise their religious rights just as any nonsecular speakers would be allowed to do. Thus, the government can maintain neutral accommodation of religious speech within the framework of the First Amendment.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit should be reversed because Petitioner's policy permitting student-led, student-initiated prayer at football games passes constitutional muster under the Establishment Clause.

Respectfully submitted,

LINDA L. SCHLUETER
Texas Bar No. 24000127
8122 Datapoint, Suite 812
San Antonio, TX 78229
Phone: 210-614-7157
Fax: 210-614-6656
Counsel for Amici Curiae

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In The
SUPREME COURT OF THE UNITED STATES

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, Individually and as next of friend for her minor children, Jane and John Doe, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* FOR MARIAN WARD AND OTHER STUDENTS AND PARENTS OF SANTA FE INDEPENDENT SCHOOL DISTRICT IN SUPPORT OF PETITIONER

KELLY J. COGHLAN
Counsel of Record
COGHLAN & ASSOCIATES
505 Lanecrest, Suite One
Houston, TX 77024-6716
(713) 973-7475
Attorney for Amici Curiae Students and Parents of Santa Fe Independent School District

QUESTION PRESENTED

1. Whether Petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.

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D Santa Fe Independent School District's "Guidelines for Student Messages at Football Games (1999)" D1

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae[2] include Marian Ward, Stephanie Vega, and 157 other students and parents of the Santa Fe Independent School District [hereinafter "SFISD"]. Stephanie Vega and Marian Ward (as alternate runner-up) were elected by their classmates in May, 1999, to deliver a pre-game solemnization before the football games for the 1999/2000 school year. When Stephanie Vega resigned on August 25, 1999, Marian Ward took her place.

Under the Fifth Circuit's decision, a student is allowed to say virtually anything to formalize the beginning of football games, other than a prayer. Marian Ward and other *Amici* do not understand why the federal courts have become anti-God, anti-religion, and anti-prayer, and why the State is forcing viewpoint discrimination upon them. The Fifth Circuit has sent a powerful message--that the government disapproves of *Amici* and that *Amici* are outsiders.[3]

Counsel for *Amici Curiae* was hired by *Amici* to seek governmental neutrality regarding student choice and

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[1] The parties have consented to the filing of this brief and their consents are submitted herewith. Kelly Coghlan authored the brief in its entirety. No person or entity made a monetary contribution to the preparation or submission of this brief other than counsel for *Amici* and SFISD students and parents who are *Amici* herein. Kelly Coghlan is not working for, or on behalf of, any church, religious organization, association, political party, or "special interest" group.

[2] *See* App. A for list of *Amici Curiae*. *Amici* students have been limited to those presently attending Santa Fe High School (9th-12th grades) or who will be attending next year (i.e., students presently in the 8th grade). *Amici Curiae* parents have been limited to parents of *Amici* students.

[3] If endorsement of religion is unconstitutional because it "sends a message to nonadherents that they are outsiders," disapproval is unconstitutional because it "sends the opposite message." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

implementation of a "brief invocation and/or message" (or "statement") at football games and an "invocation and benediction" at graduation services--without judicial or governmental censorship, scripting, or viewpoint discrimination.

INTRODUCTION AND SUMMARY OF ARGUMENT

The civil liberties of 46,280,000[4] students attending public schools in America are at risk as a result of the Fifth Circuit panel's split-decision in the present case. Shortly after the decision, school districts began requiring students to submit their proposed graduation solemnizations to school officials for editing, to assure viewpoint conformity.[5] Within weeks of the case, another federal circuit was already citing the Fifth Circuit as supporting authority for placing harsh restrictions on the religious liberties of students under its own jurisdiction. *See Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, *vacated*, 174 F.3d 1271 (11th Cir. 1999, *pending en banc*). And, as a direct result of the Fifth Circuit's decision, SFISD school officials took steps to assure the elimination of prayerful speech at SFISD football games.[6]

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[4] "Nation-wide more than 52 million children are enrolled in school, from kindergarten through the twelfth grade; 89 percent go to public schools, 11 percent to private schools". NBC Nightly News: NBC News In Depth (NBC television broadcast, Feb. 10, 1999). And the number of secondary school-age students is on the rise: "The U.S. Census Department says the American teen population is on a growth spurt. From 31 million last year to an estimated 50 million by the year 2010." Dateline NBC (NBC television broadcast, July 7, 1999).

[5] *See* App. B containing Katherine Hackleman's graduation prayer reflecting the words unilaterally excised by school officials in *Hackleman v. Aledo Indep. Sch. Dist.*, No. 499-CV-0416-Y (D. Tex. filed May 20, 1999).

[6] *See* App. C which contains the Affidavit of Marian Ward filed with her Complaint in *Ward v. Santa Fe Indep. Sch. Dist.*, No. 99-CV-556 (D. Tex. filed Sept. 2, 1999).

See also App. D which contains SFISD's "Guidelines for Student Messages at Football Games (1999)" [hereinafter "Guidelines"].

Between August 19, 1999 and September 2, 1999, the following occurred in SFISD:

(1) On August 19, 1999, SFISD Superintendent Richard Ownby announced: "(If they do pray), they would be disciplined just as if they had cursed." Molly Lynch, *No Pregame Prayer To Be Heard In Santa Fe*, Texas City Sun, Aug. 20, 1999, at 1. As a result of this threat, on August 25, 1999, Stephanie Vega resigned her position, and the alternate, Marian Ward, took her place. Kevin Moran, *Santa Fe Gets New Speechmaker*, Houston Chronicle, Aug. 28, 1999, at A35. *See also* App. C at C2, C3.

(2) During the day of August 31, 1999, Marian Ward was summoned to appear in the Principal's office where she was met by Principal Gary Causey and Superintendent Richard Ownby, given the written Guidelines (*see* App. D), instructed to read the Guidelines while Causey and Ownby watched, and instructed to comply. *See* App. C at C3, C4.

(3) On August 31, 1999, Marian Ward was instructed by Principal Causey and Superintendent Ownby to write out the "message" she intended to give and submit it to Principal Causey the day before the football game "in case anything needs to be edited before Friday's game." *See* App. C at C4.

(4) On September 1, 1999, three SFISD High School teachers warned Marian Ward not to violate the Guidelines. *See* App. C at C4.

(5) On September 2, 1999, Marian Ward was called out of class by a teacher and warned not to violate the Guidelines. *See* App. C at C7.

In 1962, state/local legislative branches of government were prescribing and proscribing when, where, and what students could pray.[7] In 1999, with the advent of the Fifth Circuit's decision, it is now the federal judicial branch prescribing and proscribing when, where, and what students can pray.[8] "[R]eligious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992) (emphasis added). It is important to *Amici*, and the additional 46 million students attending public schools in America, that this Court correct the current misinterpretation of the First Amendment.

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[7] *See Engel v. Vitale*, 370 U.S. 421 (1962).

[8] Exerting control over the content of students' prayers in one instance and entirely proscribing students' prayers in another.

ARGUMENT AND AUTHORITIES

I. "Message"/"Invocation"/"Benediction"/"Statement" Policies Of SFISD Are Constitutional As Written

The facts do not present a prayer case but rather an "utterance" case. The Fifth Circuit's numerous references to SFISD's policies as "prayer policies" is a misnomer. *See Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 812 & 816-18 (5th Cir. 1999) [hereinafter "*Santa Fe*"]. "Prayer" is not mentioned, much less required or encouraged under the SFISD football policy or graduation policy. SFISD's football policy speaks of a "brief invocation and/or message (or "statement"[9])...to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition;" and the graduation policy speaks of an "invocation and benediction."[10] The definitions of "invocation" ("the action or an act of petitioning for help or support"), "benediction" ("an expression or utterance of blessing or good wishes"), "message," and "statement" have no required prayer or religious component.[11]

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[9] The Fifth Circuit's opinion reproduces only a portion of the football policy. *See Santa Fe*, 168 F.3d at 812. The football policy's second and fifth paragraphs, not reproduced in the opinion, use the additional word "statement" to describe the unfettered breadth of student choice over content. *See* App. E at E1, E2.

[10] *See* App. E for full text of the SFISD football policy and graduation policy.

[11] *See* Webster's Third New International Dictionary (3d ed., Merriam Webster Inc. 1993) at 1190, 203, 1418 & 2229. There is no evidence that SFISD intended variant meanings outside of the true definitions. *See also Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 969 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) [hereinafter "*Clear Creek II*"] ("But the Resolution permits invocations free of all religious content...."). As much as the Fifth Circuit would like to read the word "prayer" into SFISD's policies, factual support for such inclusion is lacking.

Under the SFISD policies,[12] secular messages may be selected for all SFISD football games (and graduations), and a prayer might never be uttered (*a fortiori*, from year to year, students may decide to have no student solemnizations at all). To assume that students will always (or ever) opt for prayerful messages is speculative. The definitions of "invocation," "benediction," "message," and "statement" are so broad as to include virtually any solemnizing utterance.

Under SFISD's football policy, the school district does not itself decide that there will be a student message at football games (compare this to school districts' "moment of silence" policies giving students no choice as to whether a moment of silence will be observed). Neither does SFISD decide who will give the message,[13] nor does it determine the content of the message.[14] Rather, students, by secret ballot,

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The following remarks would meet all four definitions of the terms used in the SFISD policies, yet contain no prayer or other religious component: "Welcome. We ask that everyone do his/her part in helping to make this a safe game tonight by observing good sportsmanship, both on the field and in the stands. We all join together in asking that there be no injuries. Good luck to both teams."

[12] The football policy and graduation policy were enacted by the 1995 SFISD School Board. The district court found that "SFISD had abandoned any [previous] potentially problematic policies." *See Santa Fe*, 168 F.3d at 813. There is no evidence implicating the 1995 SFISD School Board of any unconstitutional motivations in passing the two 1995 policies in issue (indeed, the policies were passed pursuant to the district court's orders and under the district court's watchful eye--*see id.* at 812).

[13] Contrary to the Fifth Circuit's implication of exclusivity (*see Santa Fe*, 168 F.3d at 820), the pool of potential speakers under the graduation policy includes every senior; and under the football policy, includes every student. Under both policies, any and all students in the respective pools are eligible to volunteer to be selected by their peers via secret ballot. *See* App. E.

[14] Both the football and graduation policies facially provide neutral accommodation of student decisions regarding solemnizations which

decide if they would like a student pre-game message at that years football games, and if so, then decide, by a second secret ballot, which volunteering student will be the student representative.[15]

The Fifth Circuit is factually incorrect in its' assertion that "school officials are present and have the authority to stop the prayers." *Id.* at 823. The texts of the policies do not support this contention;[16] there is no evidence in the record to support this contention; and, *a fortiori*, the district court's Order of May, 1995, makes it clear that such is not the case: "SFISD should play no role in selecting the students or scrutinizing and approving the content of the invocations and benedictions." *Id.* at 811.[17] "[O]nce the class of elected student speakers is chosen, SFISD maintains no power, discretionary or otherwise, to bar any duly chosen speaker from accomplishing his task." *Id.* at 831 (Jolly, J., dissenting).[18]

students choose without endorsement, coercion, or entanglement by the district (the content of which the school board neither scripts, supervises, endorses, suggests, or edits).

[15] Permitting student choice does not equate to causation and does not equate to "state action" violating the Establishment Clause. If a student gives a prayerful message, state action is separated from the presence of the prayer by at least three intervening causes: (1) students, not SFISD, determined whether to have a student message, (2) students, not SFISD, selected the student speaker, and (3) the student speaker, not SFISD, selected the message.

[16] The football policy states: "The student volunteer selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy." *See* App. E at E1, E2 (emphasis added). It is the student's choice; not the State's.

[17] Unlike *Ingebretson v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir.), *cert. denied*, 519 U.S. 965 (1996), nowhere do the SFISD policies allow school officials to "decide who prays and which prayers qualify" (*Id.* at 278), "inform students...that they can pray" (*Id.* at 279), "review the content of prayers" (*Id.*), "determin[e] who gets to say the prayer at each event" (*Id.*), or have "teachers, school administrators and clergy at school functions where attendance is compulsory" conduct prayers (*Id.*).

II. Solemnization As Historically Practiced In America Does Not Support Fifth Circuit's Rationale

The Fifth Circuit's rationale for prohibiting prayer at football games is that "football games [are] hardly the sober type of annual event that can be appropriately solemnized with prayer." *Id.* at 823.[19]

Webster's Third New International Dictionary (3d ed., Merriam Webster Inc. 1993) at 2168, defines "solemnize" as: "1: to hold, conduct, observe, or honor with due formal ceremony or solemn notice." The definition has no restricted applicability to only events which themselves are "a sober type of annual event" or "singularly serious" or "nurturing," as the Fifth Circuit so narrowly confines the term. *Id.*

Eating a meal would not fit within the Fifth Circuit's definition of an event that "can be appropriately solemnized with prayer," and yet, millions pray daily to solemnize the routine occasion of eating. Thousands of Rotary Clubs and similar organizations assemble weekly to eat and meet, and yet these secular organizations solemnize these common,

[18] Thus, if SFISD stopped a solemnization based on viewpoint discrimination, students would, no doubt, have legal recourse against SFISD for violating the district court's orders, breaching its own SFISD written policies, and violating students' constitutional rights. There is no evidence of SFISD ever interrupting or stopping a students' message.

[19] The Fifth Circuit's ruling singularly prohibits "prayer;" not songs or other forms of solemnization. *Millenium Prayer*, by British music legend Sir Cliff Richard, has been No. 1 on Britain's pop music charts for three weeks. The song is a version of the Lord's Prayer set to the tune of *Auld Lang Syne*. *See The Countdown Begins*, Houston Chronicle, Dec. 20, 1999, at 2A. If a student were to choose to solemnize a football game by singing a few stanzas from this popular secular song, would it be prohibited "prayer" or permissible expression? This is the type of entanglement the Fifth Circuit's ruling invites and would necessitate.

non-ceremonial events with vocal prayer. Many rodeos and other secular sporting events routinely open with vocal prayer. Congress solemnizes every session with vocal prayer--not merely its special ceremonial occasions.[20] Each day a federal court (including this honorable Court) is in session is not necessarily a "singularly serious" day of solemn ceremony (nor an "annual event"), yet a law clerk opens with a vocal solemnization that ends with the prayer, "God[,] save the United States and this Honorable Court."[21]

Why should courts restrict students' solemnizations that mention "God" to only once-in-a-lifetime events, when federal courts do not restrict their own use of daily vocal solemnizations (containing a prayer comprised of two supplications to "God") to the same standard.[22]

America's earliest leaders (many of whom were responsible for drafting and passing the First Amendment) recognized great benefit in public, vocal prayers and other public recognitions of God.[23]

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[20] *See Marsh v. Chambers*, 463 U.S. 783, 786 (1983). *See also Lynch*, 465 U.S. at 674 (emphasis added):

> It is clear that neither the 17 draftsmen of the Constitution who were Members of the First Congress, nor the Congress of 1789, saw any establishment problem in the employment of congressional Chaplains to offer daily prayers in the Congress.... It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers.

[21] *See Lee*, 505 U.S. at 635 (Scalia, J., dissenting); *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989); *Lynch*, 465 U.S. at 693 (O'Connor, J. concurring); *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

[22] *A fortiori*, citizens required to be present before federal courts are "captive audiences" to the solemnizations, which are State endorsed.

[23] (1) After having met for several months, by June 28, 1787, the delegates had come to an impasse at the Constitutional Convention. At that crucial juncture, Benjamin Franklin addressed the Convention:

> In the beginning of the contest with Britain, when we were sensible of danger, we had daily prayer in this room for Divine protection. Our prayers, sir, were heard and they were graciously answered.... And have we now forgotten that powerful Friend? Or do we imagine we no longer need his assistance? I have lived, sir, a long time, and the longer I live, the more convincing proofs I see of this truth--that God governs in the affairs of men. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, sir, in the Sacred Writings, that "except the Lord build the house, they labor in vain that build it." I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better than the builders of Babel....
>
> I therefore beg leave to move that, henceforth, prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the clergy of this city be requested to officiate in that service.

2 James Madison, The Papers of James Madison 984-86 (Henry D. Gilpen ed., Washington: Langtree & O'Sullivan 1840) (1787).

There are conflicting accounts as to whether a vote was taken on Franklin's motion. *See* Letter from William Steele to Jonathan Steele (1825), *in* 3 Records of the Federal Convention of 1787 at 472 (Max Farrand ed., Yale Univ. Press 1911) ("The motion for appointing a chaplain was instantly seconded and carried"); *but see* 2 James Madison, The Papers of James Madison 986 (Henry D. Gilpen ed., Washington: Langtree & O'Sullivan 1840) (1834) (The motion was made too "late" and "the Convention had no funds [to pay a chaplain]" so there was "adjournment without any vote on the motion"). However, it appears that the Convention may have included prayer at subsequent meetings. *See* Letter from Luther Martin to Maryland State Legislature (Jan. 27, 1788), *in* 1 Debates in the Several State Conventions on the Adoption of the Federal Constitution 373 (Jonathan Elliot ed., Washington: Printed for the Editor 1836) ("[During the Constitutional Convention] we had appealed to the Supreme Being...[and] we scarcely had risen from our knees, from supplicating his aid and protection, in forming our government....") (emphasis added); *see also* 3 Records of the Federal Convention of 1787, *supra* at 472 ("[After] three days of recess [following Franklin's motion]...as soon as the chaplain had closed his prayer...." (emphasis added)). If Franklin's proposal failed, it was not because the Convention perceived a problem with public, vocal prayer in a governmental setting on government property, but rather for logistical

reasons (i.e., lack of funds for a chaplain; midstream adoption would highlight prior omission). *See also Marsh*, 463 U.S. at 788 n.6.

One year and nine months later, on April 7, 1789, one day after the Senate of the First Congress convened with a quorum, the Senate appointed a committee "to take under consideration the manner of electing Chaplains." On April 9, 1789, a similar committee was appointed by the House. On April 25, 1789, the Senate elected its first chaplain. On May 1, 1789, the House elected its first chaplain. On September 22, 1789, Congress passed a statute providing for payment of chaplains. Three days later, on September 25, 1789, Congress reached final agreement on the language of the Establishment Clause. *See id.* at 787-89. The First Congress obviously perceived no conflict between the Establishment Clause and vocal, public prayer in a governmentally organized setting on government property.

(2) The First Congress enacted the Northwest Ordinance (signed into law on August 7, 1789, by President George Washington) for the governance of the territory northwest of the Ohio River. Article III is the only section to address either education or religion and requires the following: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 50 at 52, n.(a) (emphasis added). No distinction is made between private and public education. The First Congress (i.e, the framers of the First Amendment) believed that "schools" and educational systems were a proper forum to encourage "religion, morality, and knowledge." Congress applied the requirements of the Ordinance to new territories for decades thereafter.

The true meaning of the Establishment Clause can only be understood in its historical setting. It is doubtful that the same men would draft and pass a law on August 7, 1789 (in the middle of the debates on the First Amendment) that would be contrary to the intent of the Establishment Clause which they passed the following month, on September 25, 1789. Certainly, the original intent of the Establishment Clause would allow permitting a student-led, student initiated prayer in "schools."

(3) On September 24, 1789, the House approved the final wording of the First Amendment and passed a Resolution requesting President George Washington to issue a Thanksgiving Proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts, the many and signal favors of Almighty God...." *See* 1 Annals of Cong. (Joseph Gales ed., 1834) 949-50. On September 25, 1789, the Senate approved the final wording of the First Amendment and concurred with the House Resolution calling for a Thanksgiving Proclamation. *See* Journal of the First Session of the Senate 88 (Gales &

Throughout America's history, prayer has been regularly employed to solemnize activities ranging from the mundane to the sublime--including high school football games. When interpreting the Constitution, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Justice Holmes).

III. Secular Purposes Of Solemnization In Schools Support Constitutionality Of SFISD's Policies

In public schools, there are student activities having natural beginnings and endings--such as football games and graduations. Just prior to the beginning of these activities,

Seaton 1820). On Oct. 3, 1789, George Washington issued the Thanksgiving Proclamation. *See* 12 George Washington, The Writings of George Washington 119-20 (Jarad Sparks ed., Boston: American Stationers' Co. 1838).

Presidents George Washington, John Adams, and James Madison issued federal Thanksgiving Proclamations calling for public prayers and acknowledgements of God. *See Wallace v. Jaffree*, 472 U.S. 38, 103 (1985) (Rehnquist, J., dissenting). As a member of Virginia's legislature and then as Governor of Virginia, Thomas Jefferson also issued calls and proclamations for days of prayer, fasting, and thanksgiving, but did not do so as President as he believed the "power to prescribe any religious exercise...must rest with the State" [rather than with the Federal Government]. (emphasis added). *See* 1 Thomas Jefferson, Writings of Thomas Jefferson 9-10 (Albert Bergh ed., Washington: Thomas Jefferson Memorial Assoc. 1903) (As a Virginia legislator, Jefferson called for "a day of fasting, humiliation, and prayer, to emplore Heaven"); *see also* 10 Dictionary of American Biography 18 (Dumas Malone ed., Charles Scribner's Sons 1933) (Jefferson was "one of the champions of the Resolution for a fast day"); *see also* 2 Official Letters of the Governors of the State of Virginia 64-66 (H. R. McIlwaine ed., Virginia State Library 1928); (As Governor of Virginia, Jefferson issued a thanksgiving proclamation in 1779, stating in part: "I do therefore...appoint...a day of public and solemn thanksgiving and prayer to almighty God"); *see also* 4 Thomas Jefferson, Memoir, Correspondence, and Miscellanies, From the Papers of Thomas Jefferson 104 (Thomas J. Randolph ed., Boston: Gray & Bowen 1830) (1808) (The "power to prescribe any religious exercise...must rest with the State").

there is usually noise, walking around, talking and such. Attaining attention, silence, and focus normally entails some act to mark the beginning of the occasion. In America, solemnizations have traditionally been utilized for this purpose. Methods of solemnization vary, but all generally provide a moment conducive to reflection, focusing, and calming.[24]

Justice O'Connor has written that "acknowledgements" such as, *inter alia*, "legislative prayers...serve in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."[25] Prayer serves

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(4) George Washington called upon America and its' citizenry to acknowledge God:

> I am sure that never was a people who had more reason to acknowledge a Divine interposition in their affairs, than those of the United States, and I should be pained to believe that they have forgotten that agency, which was so often manifested during our Revolution or that they failed to consider the omnipotence of that God who is alone able to protect them.

10 George Washington, The Writings of George Washington 222-23 (Jared Sparks ed., Boston: American Stationers' Co. 1838) (March 11, 1792, Letter to John Armstrong) (emphasis added).

[24] While ceremonial prayer is one method of solemnization, it certainly is not the only method. A moment of silence, reading a quote, singing the National Anthem or other song, reciting the Pledge of Allegiance, offering words of welcome, and various other methods have been used as techniques of solemnization, and are all available for use by students as "invocations," "benedictions," "messages," and/or "statements" under SFISD's football and graduation policies. A targeted elimination of one method of solemnization simply because it contains a religious content is not in keeping with "a course of 'neutrality' toward religion" (quote from *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973)). Such targeted discrimination is not required by the Establishment Clause.

[25] *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring); *see also Alleghany*, 492 U.S. at 595-596 n.46; *Id.* at 630 (O'Connor, J., concurring); *Engel*, 370 U.S. at 435 n.21. Implicit in this observation is

the valid secular purpose of solemnization.

It is axiomatic that in the absence of students there would be no football games or graduations. These events exist primarily for the benefit of students, not primarily for the benefit of school officials or judges. High school students (in the final stages of their required formal education) are already deemed mature enough to run their own student government, elect their officers and representatives, take college level courses, plan school events, drive automobiles, and vote and be drafted to fight wars when they reach majority during their senior year. In the past, this Court has affirmed the maturity level and abilities of high school students. *See Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990).

There is no compelling reason for school officials or judges to be involved in conducting or scripting solemnizations of student activities when students are desirous and capable of doing this themselves. Permitting students a choice concerning the issue of brief solemnizations of some of their own student activities is a logical progression of other responsibilities already entrusted to high school students and does not put the government in a position of endorsing anything other than student choice.

There are educational benefits to allowing students the opportunity of deciding for themselves how, when, if, and by whom, they wish to solemnize, formalize, and dignify some of their own student activities. Placing this responsibility on students provides educational opportunities in, *inter alia*,

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that ceremonial solemnization (including prayer) is not intended to, nor does it, have the primary effect of attracting new converts or advancing religion. The undersigned has been unable to document a single historical instance of revival breaking out as a result of a prayer at a high school football game or graduation ceremony.

speech, civics, government, and constitutional law.[26]

There are numerous other secular reasons supporting the appropriateness of solemnizing football games (with prayer as a permitted option). Not only do high school football games pose a potential for physical injuries to young players, they regularly involve longstanding rivalries between schools and towns. These games present potential for conflict, dissension, and violence between opposing fans.[27]

A moment of quiet, solemn expression (traditionally a prayer) has historically gone far to soothe turbulent atmospheres at high school football games.[28] This is an important

[26] Students selected by peers to conduct solemnizations must author, prepare, practice, and deliver a short public address, thereby providing educational opportunities in speech and presentation. Exposure to diverse student solemnizations can be educational for those listening, also promoting tolerance of other's ideas and expressions. The voting and implementation process provides all students with learning opportunities in civics, government, and constitutional law. These are all educational subjects worthy of hands-on learning in high school. Rather than merely learning about these subjects academically, the process involves the students in the operation, exercise, and practice of the subjects.

[27] Who among us has not witnessed (in person or via media) verbal or physical acts of aggression or violence between fans of opposing teams at sporting events--especially at high school football games.

[28] In Longview, Texas, during the 1970/71 school year (when the all black Womack High School was merged, under federal court order, with Longview High School) the undersigned was a senior. It was a time of tension, fear, fights, and violence. The bloodiest and most widespread fighting of the year occurred on a Friday afternoon before a high school football game. Although school officials broke up the near riot, there were injuries, and the rumor was that the racial violence would continue at the football game that night and that blacks and whites were organizing for a confrontation. Before the beginning of the game, the tension was palpable. When it was time to start the opening formalities, the President of the Student Council began a prayer over the public address system (specifically addressing the black/white issues--how all are equal, how love of each other must prevail, asking for peace and blessings on all, and seeking God's intervention). The mood changed,

tradition which has, throughout the years, fostered calm, reflection, good behavior, and safer games.

IV. Students' Religious Expression, As Opposed To Government's Religious Expression, Is Protected Speech

The Fifth Circuit fails to adequately distinguish between government speech and private speech. The First Amendment states: "Congress [meaning all levels of government, including public school governance] shall make no law [policy or act] respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the free-

tension melted, and there was a calm which continued throughout the game with no fights or confrontations.

Is there less of a need today for student solemnization (with prayer as a permitted option) than in 1970? Have the schools of 1999 become so much calmer and safer than the schools of 1970? Consider: Pearl, Mississippi, October 1, 1997, two dead, seven wounded; West Paducah, Kentucky, December 1, 1998, three dead, five wounded; Jonesboro, Arkansas, March, 1998, five dead, ten wounded; Springfield, Oregon, May, 1998, four dead, twenty-one wounded; Richmond, Virginia, May, 1998, two wounded. Dateline NBC: *Gunfire At Armstrong High* (NBC television broadcast, Sept. 25, 1998). Littleton, Colorado, April 20, 1999, fifteen dead, twenty-three wounded; Conyers, Georgia, May 20, 1999, six wounded; Fort Gibson, Oklahoma, Dec. 6, 1999, four wounded. Dateline NBC: *Morning Mayhem* (NBC television broadcast, Dec. 6, 1999).

"[T]he report issued by the Milton S. Eisenhower Foundation...said violence is much more prevalent today than 30 years ago.... From 1969 to 1998, the rate of violent crime...jumped from 800 incidents per 100,000 to 1,218, the report found." Eric Lichtblau, *Still 'A Society In Deep Trouble,'* Houston Chronicle, Dec. 6, 1999, at A1.

Barry Mano, President of the National Association of Sports Officials, states, "We are getting more reports than ever in the history of the organization with regard to referees being assaulted." 20/20 (ABC television broadcast, May 30, 1999).

More, not fewer, solemnization opportunities are needed in public schools to foster an atmosphere of calm, focus, and composure, with the goal of producing safer sporting events and safer schools.

dom of speech...." The sole focus of the First Amendment is on what "Congress" (all levels of government) may not do; not on what private citizens (students) may not do. The First Amendment does not prohibit acts by private citizens; only acts by the government (i.e., "state action"). Students are private citizens; public school officials are government.

The concept of the "wall of separation between church and state"[29] is not a "wall" between religious and non-

[29] The phrase "wall of separation between Church and State," although not expressed in the Constitution, was utilized in interpreting the First Amendment in the 1947 case of *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947). The phrase was never used in the months-long congressional debates surrounding the First Amendment. *See* 1 Annals of Cong. 440-949 (Joseph Gales ed. 1834) (debates from June 8-Sept. 24, 1789). The phrase was taken from a short, private note of courtesy dated January 1, 1802, to the Danbury Baptist Association from President Thomas Jefferson. *See* 16 Thomas Jefferson, Writings of Thomas Jefferson 281-82 (Albert Bergh ed., Washington: Thomas Jefferson Memorial Assoc. 1904). Jefferson was responding to a letter from the Association. The Association was concerned that the inclusion of the Religion Clauses in the Constitution indicated that religious liberties were deemed government-given (rather than God-given inalienable rights) and might thereby provide government the ability to interpret the Clauses in a way to "punish" or regulate religion or the religious:

> Our sentiments are uniformly on the side of religious liberty...that no man ought to suffer...on account of his religious opinions [and] that the legitimate power of civil government extends no further than to punish the man who works ill to his neighbor. But sir, our [U.S.] Constitution of government is not specific,...therefore what religious privileges we enjoy (as a minor part of the State) we enjoy as favors granted and not as inalienable rights.

See Letter of Oct. 7, 1801, from Danbury (CT) Baptist Assoc. to Thomas Jefferson (Thomas Jefferson Papers Manuscript Div., Library of Congress) (emphasis added).

It is clear from the context that Jefferson's "wall" metaphor was intended solely to allay the specific fears of the Association concerning governmental encroachment upon religion.

Although this Court has often looked to Jefferson as an authority on the Establishment Clause, Jefferson was living in France at the time the

religious students but is a wall between the government and all students.[30] While government required or instigated prayer in public schools is unconstitutional,[31] the Court has never prohibited genuinely student-led, student-initiated prayer in public schools. "[T]he Establishment Clause does not ban prayer. It bans *state* prayer." *Chandler v. James*, 180 F.3d 1254, 1258 (11th Cir.1999).

"It can hardly be argued that...students...shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). Nor can it be argued that students become state actors when they walk through the schoolhouse gate:[32] "First, students are not state

First Amendment was drafted and approved by Congress; Jefferson was not consulted about the language of the First Amendment; and Jefferson's letter to the Danbury Baptist Association was written more than twelve years after the wording of the First Amendment was passed by Congress. *See Jaffree*, 472 U.S. at 92 (Rehnquist, J. dissenting).

Chief Justice Rehnquist has referred to the "wall" concept as "a mistaken understanding of constitutional history...[and] Jefferson's misleading metaphor." *Id.* The Court itself has acknowledged that the "wall" "is not a wholly accurate description" (*Lynch*, 465 U.S. at 673), "is a blurred, indistinct, and variable barrier" (*Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)), "dimly perceive[d]" (*Id.* at 612), and does "not call for total separation between church and state." (*Id.* at 614). As stated in *Lynch*, 465 U.S. at 673: "'It has never been thought either possible or desirable to enforce a regimen of total separation' (quoting *Nyquist*, 413 U.S. at 760). Nor does the Constitution require complete separation of church and state...."

[30] As long as members of the government (including the judiciary) do not "jump over the wall" and attempt to influence students' religious expressions (either instigating or stifling) the "wall" is not breached. It is for this reason that it would not be a constitutional violation for a Jewish student to share his faith with a Christian student on campus but would be unconstitutional for the principal to do the same thing. The Jewish and Christian students are private citizens on the same side of the "wall."

[31] *Engel*, 370 U.S. 421.

[32] "Religious speech by students does not become forbidden 'state

actors and, therefore, by definition, their actions cannot tend to 'establish' religion in violation of the Establishment Clause. Second, the Free Speech and Free Exercise Clauses of the First Amendment require the State to *tolerate* genuinely student-initiated religious speech in schools." *Chandler*, 180 F.3d at 1258 (referring to the school district's legal position which the court generally adopts in its opinion). Any constitutional analysis of a school prayer issue must, by definition, focus on the government's actions, not on students' actions.

The Constitution prevents government's pro-religious acts (Establishment Clause), but protects students' pro-religious acts (Free Exercise and Free Speech Clauses). As stated in *Mergens*, 496 U.S. at 250:

> [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support [religious] student speech that it merely permits on a non-discriminatory basis.

If student speech incidentally advances religion in some sense, this does not violate the Establishment Clause since student speech is private speech: "[T]o have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corporation of Presiding Bishop of the Church of Jesus Christ v. Amos*, 483 U.S. 327, 337 (1987).

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action' the moment the students walk through the schoolhouse door. *Chandler*, 180 F.3d at 1261-62.

However, if a school district requires or instigates prayer,[33] or characterizes prayer as a favored practice,[34] it is this action ("state action") which violates the Establishment Clause. "[I]t is the *State's decision to create an exclusively religious medium* which violates the Establishment Clause;

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[33] For instance: (1) school officials writing and requiring students to recite a prayer (*Engel*, 370 U.S. 421); or, (2) school officials delegating surrogates to do what the officials themselves may not constitutionally do directly--as when school officials select clergy and/or students and direct them to pray at school events as in *Lee*, 505 U.S. 577 (principal selecting and directing clergy to pray at graduation), or as in *Karen B. Treen v. David Treen*, 653 F.2d 897 (5th Cir. 1981) (school board guidelines requiring student-led or teacher-led prayers in classrooms); or, (3) enacting school district policies permitting private parties to speak but then limiting the speech to a prayer or other religious speech as in *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989) (authorizing student-led "invocations" and only invocations at school sporting events), or as in *Hall v. Board of Sch. Comm'rs*,) 656 F.2d 999 (5th Cir. 1981) (school policy permitting "devotionals" and only devotionals); or, (4) where school personnel engage in active "participation in these prayers" as in *Doe v. Duncanville*, 70 F.3d 402, 406 (5th Cir. 1995).

[34] *Wallace v. Jaffree*, 472 U.S. 38 (1985) illustrates the principle: Alabama passed a law authorizing a moment of silence "for meditation or voluntary prayer" to replace its previous law authorizing a moment of silence "for meditation." While this Court spoke favorably of the prior law (which was not being challenged), the Court found the new statute unconstitutional because: "The addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice." *Id.* at 60 (emphasis added). The Court noted that the previous law "contain[ed] nothing that prevented any student from engaging in voluntary prayer during a silent moment of meditation" but did so without highlighting "prayer" as governmentally favored. *Id.* at 59. It was the State's action of elevating prayer as a favored governmental practice that made the law unconstitutional, not the fact that students prayed.

Unlike *Jaffree*, nowhere does the word "prayer" appear in either of SFISD's policies. Furthermore, there is no evidence indicating any intent on the part of SFISD (or interpretation on the part of students) that the football and/or graduation policy required or favored prayer. To assume otherwise would be speculation going beyond the record. SFISD's football and graduation policies do not characterize prayer as favored.

not the private parties' religious speech." *Chandler*, 180 F.3d at 1259. SFISD's football policy does not require, directly or indirectly, that student speech be religious. If a pre-game student solemnization has religious overtones, it is only because a student has independently decided that it have such.

V. Permitting Religious Speech Is Not Synonymous With Endorsement

"It is not the 'permitting' of religious speech which dooms these policies, but rather the requirement that the speech be religious...." *Id.* at 1259 (emphasis added). Permitting students to determine how to formalize the beginning of some of their own student activities does not place the district in a position of either supporting or opposing the students' choice (much less opposing or supporting prayer--which might never be selected by a student). And, if a student selects a prayerful solemnization and the selection is genuinely student-initiated and devoid of governmental influence, the Establishment Clause does not require the school district to stop the student's speech.[35]

> Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's--either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.

Chandler, 180 F.3d.

If a student may select a secular solemnization, neutrality dictates that a student may also select a religious solemnization--without governmental interference.[36] "What is crucial is that a governmental practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) (emphasis added). The State does not have a positive duty to censor student speech if it is religious: "The suppression of student-initiated religious speech is neither necessary to, nor does it achieve, constitutional neutrality towards religion. For this reason, the Constitution does not permit its suppression." *Chandler*, 180 F.3d at 1261.

Furthermore, government may not favor one speaker over another based on viewpoint. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys...[or] favor one speaker over another.... Discrimination against speech because of its message is presumed unconstitutional.... Viewpoint discrimination is thus an egregious form of content discrimination". *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).[37]

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[35] The First Amendment does not require the "government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach*, 343 U.S. at 314. *See also Mergens*, 496 U.S. at 250 ("[A] school does not endorse or support [religious] speech that it merely permits on a non-discriminatory basis"); *Chabad-Lubavitch of Georgia v. Miller*, 5 F3d 1383, 1391-92 (11th Cir. 1993) (*en banc*) ("[T]he failure to censor is not synonymous with endorsement"). If endorsement of religion is unconstitutional because it "sends a message to non-adherents that they are outsiders," "disapproval" is unconstitutional because it "sends the opposite message." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (emphasis added).

[36] "[A] denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech...." *Mergens*, 496 U.S. at 253; *see also Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981). Government must pursue "a course of 'neutrality' toward religion." *Nyquist*, 413 U.S. at 792-93.

[37] *See also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("the government violates the First

Even in a non-public forum, government may not discriminate based on viewpoint. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) ("it is bound by the same standards as apply in a traditional public forum"); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985). "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. at 384, 394 (1993). If one student says, "Let us have a safe game tonight," and another student gives a similar message also focusing on safety but adds one three letter word and says, "God, let us have a safe game tonight," the government must treat both solemnizations and both students with equal dignity. The government must not exert viewpoint discrimination against either.

This Court has held that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Because religious speech is constitutionally protected speech, the government may not censor it.

As stated in *Lynch*, 465 U.S. at 673, "the Constitution...affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *See also Widmar v. Vincent*, 454 U.S. 263, 273-74 (1981); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973); *Zorach v. Clauson*, 343 U.S. 306, 312-15 (1952). "The first principle must always be that genuinely student-initiated religious speech must be *permitted*." *Chandler*, 180 F.3d at 1264.

Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.").

The government "may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech." *Id.* at 1266.

The last Supreme Court case to directly address the subject of school prayer is *Lee*, 505 U.S. 577 (1992).[38] In *Lee*, the Court invites non-government persons (obviously, in the context of the school prayer case, referring to students since students are generally the only non-governmental body of citizens in public schools) to undertake the "task" of

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[38] In *Lee*, the Principal unilaterally decided to have prayer at graduation, selected a clergyman to pray, and directed the clergyman to pray according to guidelines provided by the Principal. In this five to four decision, the Court came within one vote of holding that even this degree of government involvement was constitutional. In *Lee*, not only was the vote close, but the holding was narrow.

Although the *Lee* Court had the opportunity to hold that all vocal, public prayer at public school events would violate the Constitution, the Court did not do so, but rather held that only the particular circumstances of the case were unconstitutional, stating: "These dominant facts mark and control the confines of our decision...." "Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one...." "Our jurisprudence in this area is of necessity one of line drawing...." *Lee*, 505 U.S. at 586, 597, 598 (emphasis added); *see also Lynch*, 465 U.S. at 678 ("In each case, the inquiry calls for line-drawing; no fixed *per se* rule can be framed.") (emphasis added). Slightly different facts can be outcome determinative in First Amendment cases: *See id.* at 681-82; *compare with Allegheny*, 492 U.S. at 598-600. *See also Clear Creek II*, 977 F.2d at 965 & n.4 ("three plastic animals rule").

The Fifth Circuit, on the other hand, would like to fashion a *per se* rule for football games: "Prayers that a school 'merely' permits will still be delivered to a government-organized audience, by means of government-owned appliances and equipment, on government-controlled property, at a government-sponsored event, thereby clearly raising substantial Establishment Clause concerns." *Santa Fe*, 168 F.3d at 817 (emphasis added). But, if this were the test, *Lee* would have been a short opinion indeed (since all of these same factors existed in the *Lee* graduation); and *Clear Creek II* and *Chandler* and all of the Supreme Court's "neutral accommodation" cases would be wrong.

formulating "prayers" themselves:

> If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.
>
> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.

Lee, 505 U.S. at 589 (emphasis added)

It is clear from the factual context of *Lee* that the Court is speaking of vocal "prayers" at school events, on school property, using school equipment (as was the factual context of the clergy's prayer at the graduation ceremony in *Lee*). This language appears to direct school districts to permit the student body "to undertake that [prayer] task for itself."[39]

[39] Although the Court gives no guidance as to which students should "undertake the task," a school-wide decision involving all students would seem to be the most equitable. This allows school districts to be outcome-neutral and communicates to students and to the community that the district is not endorsing, coercing, or entangling itself with student selection or content of student solemnizations.

When it is widely known, as in SFISD, that the presence and content of student solemnizations are of student choice, the issue of perceived government endorsement is dispelled as "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer," "deemed aware of the community and forum," rather than "some passerby." *Pinette*, 515 U.S. at 773 & 779-780 (O'Connor, J., concurring). But, even a casual passerby should draw no more of a

And regarding such efforts by students, the Court directs that "the First Amendment does not allow the government to stifle prayers which aspire to these ends...." *Id.* **If students are never allowed by the schools or courts to attempt the "task," then these words in *Lee* are meaningless.** Student-initiated solemnization is a step toward what *Lee* suggests, and SFISD was simply following these *Lee* directives. Some federal appellate panels have followed *Lee* in this respect.[40]

conclusion of government endorsement of religion if a student should say a prayer than the same passerby should draw a conclusion of government hostility toward religion if a student should say no prayer.

Nevertheless, to avoid the possibility of any confusion, SFISD reads a disclaimer prior to the student message that states:

> (Marian Ward), a Santa Fe High School student, has been selected by her peers to deliver a message of her own choice. Santa Fe ISD does not require, suggest, or endorse the contents of (Ms. Ward's) choice of a pre-game message. The purpose of the message is to solemnize the event, and to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition. At this time, (Marian Ward).

Anthony Cargile, Pre-game Announcement at SFISD Football Games, Santa Fe, Texas (Oct. 15, 1999, Oct. 29, 1999) (transcript available in offices of Kelly Coghlan).

Additionally, since the student selection process is based on wholly secular criteria (i.e., election by peers from a list of student volunteers), it is difficult to attribute an endorsement of religion to the State. *See Lee*, 505 U.S. at 630 n.8 (Souter, J., concurring).

[40] (1) *Clear Creek II*, 977 F.2d 963--recognizes the critical difference between government-initiated and student-initiated prayer: "[A] majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies." *Id.* at 972.

(2) *Doe v. Madison Sch. Dist.*, 147 F.3d 832 (9th Cir. 1998), *vacated as moot*, 177 F.3d 789 (1999)--holds constitutional a policy in which the four top academically-ranked graduates are invited to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement" at graduation. *Id.* at 834.

(3) *Chandler*, 180 F.3d 1254--holds invalid a federal district court's injunction that prohibited student "vocal prayer or other devotional

A school district policy (either written or practiced) prohibiting vocal, public student prayer at football games would surely be as unconstitutional as a policy requiring vocal, public student prayer at football games. Are these not the two extremes of the same unconstitutional non-neutrality?

Furthermore, a policy of "equal silence for all" is not neutral since such rule prefers and advances the atheists' agenda of silencing all religious expression. "That would be preferring those who believe in no religion over those who do believe." *Zorach*, 343 U.S. at 314. "'Cleansing' our public schools of all religious expression, however, inevitably results in the 'establishment' of disbelief--atheism--as the State's religion. Since the Constitution requires neutrality, it cannot be the case that government may prefer disbelief over religion." *Chandler*, 180 F.3d at 1261. Government's tolerance of disbelief does not require, or allow, atheism to be elevated over belief. The First Amendment requires that the State tolerate both, while establishing neither. Students, however, should be free to prefer one or the other and to express that preference whenever they are permitted to speak.

On September 2, 1999, Marian Ward filed suit against SFISD. In granting Marian Ward a temporary restraining order (and then a preliminary injunction), the federal district court ruled, in part, as follows:

> If, as it appears from this record, secular speech is allowed at games over the public address system by students, then the Court concludes that the Free Speech Clause of the Constitution prohibits the School District

speech in its schools...such as aloud in the classroom, over the public address system, or as part of the program at school-related assemblies and sporting events, or at a graduation ceremony." *Id.* at 1257.

from discriminating against similar speech simply because it contains a prayerful component freely chosen by the student, even one that invokes a deity. Even in a non-public forum a government cannot discriminate against speech because of the viewpoint expressed by the speaker.

The Establishment Clause of the First Amendment requires neutrality by government in matters of religion. Just as a school policy requiring student prayer would run afoul of the Establishment Clause, a school policy prohibiting prayer also runs afoul of the Establishment Clause because it amounts to state sponsorship of atheism, i.e., state establishment of disbelief in a God instead of belief in a God.

If a student may select a non-religious solemnization, then neutrality requires that a student may also select a religious solemnization without government interference.[41]

As President William Clinton said in an address on religious liberties in public schools:

> The First Amendment, I will say it again, does not convert our schools into religion-free zones...[and] does not require students to leave their religion at the schoolhouse door.... It protects freedom of religion by allowing students to pray, and it protects freedom of

[41] *Ward v. Santa Fe Indep. Sch. Dist.*, No. 99-CV-556 (D. Tex. filed Sept. 2, 1999) (hearing on Application for Temporary Restraining Order, Sept. 3, 1999). *See* App. F for hearing transcript excerpt containing district court's ruling, Temporary Restraining Order, and Preliminary Injunction.

religion by preventing schools from telling them how and when and what to pray.[42]

VI. Judicial Censorship Or Scripting Of Student-Led, Student-Initiated Prayer Violates Students' Consciences, Amounts to Viewpoint Discrimination, And Creates A Preferred State Religion

Permitting only "non sectarian/non proselytizing" prayers creates a preferred creed and official "civic" religion of the judiciary's invention[43] (permitting students to "speak only the religious thoughts that government want[s] them to speak…and to pray only to the God that government want[s] them to pray to"[44]). The courts must then police and monitor the judicially created sect to assure adherence to its dogma and to punish aberrant utterances.[45] For the State to dictate that a student may not pray a prayer containing the words of his/her choice will not only cause the student to violate

[42] President William J. Clinton, Address at James Madison High School, Vienna, Virginia, *in* Office of the Press Secretary (The White House, July 12, 1995).

[43] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion…." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added).

[44] *Engel*, 370 U.S. at 435.

[45] The Fifth Circuit's requirement that student prayer (if any) at graduations be "nonsectarian and non-proselytizing" is little different than the Principal's requirement of the clergyman in *Lee*. The *Lee* Court found that by advising the speaker to deliver "nonsectarian" prayers, the Principal "directed and controlled the content of the prayers." *Lee*, 505 U.S. at 588. *See also Ingebretson*, 88 F.3d at 279 ("[S]chool officials [involvement] in determining which prayers are 'nonsectarian and non-proselytizing'...excessively entangles government with religion"); *Mergens*, 496 U.S. at 253 ("[A] denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech....").

his/her conscience, but, as to at least one religion, will cause the student to violate a basic tenet of his/her faith.[46]

Too many, it seems, have adopted the philosophy, "I am offended, therefore I am." [47] The idea of a person being "offended"[48] by the expression of another's prayer may simply be a euphemism for intolerance.[49] Employing the

[46] The phrase, "in Jesus' name" is not a tag line added to proselytize or offend. When Christians use this phrase, they are obeying a basic tenet of their faith. *John* 16:24, 26, 27; *see also John* 14:13-14, 15:16; *Colossians* 3:17.

[47] "In this country, it seems to me that we are ruled by the tyranny of the sensitive." Bill Moyer, Politically Incorrect (ABC television broadcast, June 16, 1999).

[48] Anthony Griffin, lead counsel for Respondents, recently wrote an editorial for the Dallas Morning News, stating: "First, let me make a confession to you. I was the high school student who refused to stand up when the National Anthem was played or when the school song was sung." Anthony Griffin, *Pre-game Prayer*, The Dallas Morning News, Nov. 14, 1999, at J1. Mr. Griffin's right to remain seated did not extend to compelling everyone else to remain seated, or to compelling the silencing of the National Anthem, or to compelling the silencing of the school song. Yet, it is this same genre of logic upon which Respondents' case rests. If all speech, songs, and expression that offended someone were eliminated, there would be little left to sing or say (or pray).

[49] "Accommodation of religious beliefs we do not share is, however, a part of everyday life in this country.... Respect for the rights of others to express their beliefs, both political and religious, is the price the Constitution extracts for our own liberty. This is a price we freely pay. It is not coerced. Only when the speech is commanded by the State does it unconstitutionally coerce the listener." *Chandler*, 180 F.3d at 1263.

If a student elects to pray as his/her choice of solemnization, any person not agreeing with the student's selection is not compelled to stand, bow their head, close their eyes, listen, or participate. Similarly, Jehovah's Witnesses who believe it is wrong to recite the Pledge of Allegiance, do not have to participate--although the Pledge is routinely said in public schools over intercom systems to "captive audiences" of children belonging to this religion. Those not believing in the Pledge are not required to stand, salute, listen, or otherwise participate; but we continue saying the Pledge. *See Barnette*, 319 U.S. 624.

machinery of government to stifle or silence student-led, student-initiated prayerful speech when similar secular speech is permitted, would unfairly discriminate against those students who share the sentiments of Benjamin Franklin, George Washington, and the First Congress, and would not be in keeping with a fair interpretation of the Establishment Clause.

CONCLUSION

Amici Curiae respectfully request this Court to reverse the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

KELLY J. COGHLAN
Counsel of Record
COGHLAN & ASSOCIATES
505 Lanecrest Lane, Suite One
Houston, Texas 77024-6716
(713) 973-7475

Attorney For *Amici Curiae*
Students and Parents of Santa
Fe Independent School District

Dated: December 30, 1999

APPENDIX

APPENDIX A

Amici Curiae[1] include:

Abney, Jim and Debbie, individually and as next friends for their minor child Derrick Abney (11th grade); Albertine, Gerard and Lois, individually and as next friends for their minor child Carrie Trahan (11th grade); Alley, Peggy, individually and as next friend for her minor child Jason Alley (11th grade); Ayala, Mike and Neli, individually and as next friends for their minor children Brina Ayala (10th grade) and Bianca Ayala (10th grade); Ballard, Gerdis and Linda, individually and as next friends for their minor child Paul Ballard, individually (12th grade); Blankenship, Bruce, individually and as next friend for his minor child Darbi Blankenship (12th grade); Boanco, Vikki, individually and as next friend for her minor child Rachel Boanco (9th grade); Bonnett, Daryn J., individually and as next friend for his minor child Dawna Bonnett (11th grade); Brittain, Sisie, individually and as next friend for her minor child Mallory Brittain (9th grade); Burris, Mrs. S.R., individually and as next friend for her minor children Greg W. Burris (9th grade) and James S. Burris (11th grade); Champiomont, Karen, individually and as next friend for her minor child Jonathan Champiomont (8th grade); Clausen, Randy, individually and as next friend for his minor child Randy Clausen (9th grade); Courtney, Dwight and Carrie, individually and as next friends for their minor children Christin Courtney (8th grade) and Cassie Courtney (9th grade); Crisp, John and Anita, individually and as next friends for their minor child Cody Crisp (9th grade); Crouch, George, individually and as next friend for his minor child Kristin Crouch (11th grade); Damron, Sandy, individually and as next friend for her minor child Kimberly Womack (9th grade); Davis, Vicki,

[1] *Amici Curiae* students have been limited to those presently attending Santa Fe High School (9th-12th grades) or who will be attending next year (i.e., students presently in the 8th grade). *Amici Curiae* parents have been limited to parents of *Amici* students.

individually and as next friend for her minor child Rachel Davis (9th grade); Decker, Billy and Tammie Decker, individually and as next friends for their minor child Rachel Decker (10th grade); Drager, Heath, individually (12th grade); Finley, Julie and Tim, individually and as next friends for their minor child Kristin Finley (11th grade); Ford, Brett and Leta, individually and as next friends for their minor child Mindy Ford (11h grade); Griswold, Larry and Karen, individually and as next friends for their minor child Aaron Griswold (11th grade); Guyton, Jim and Myrtle, individually and as next friends for their minor granddaughter Ashley Guyton (9th grade); Hayes, Allen and Barbara, individually and as next friends for their minor child Stephanie Hayes (12th grade); Hays, Justin, individually (12th grade); Hays, Susan, individually and as next friend for her minor child Kaianna Hays (10th grade); Hicks, Melinda, individually and as next friend for her minor child Candace Hicks (11th grade); Higgs, Lisa, individually (12th grade); Janice, Robert and Lynda, individually and as next friends for their minor child Nick Quesada (9th grade); Johnson, Paul and Donna, individually and as next friends for their minor child Jennifer Johnson (12th grade); Kearley, Darrell and Gina, individually and as next friends for their minor child Baily Chafin (11th grade); Kidd, Kathleen, individually (12th grade); Laursen, Dawn, individually and as next friend for her minor child Mary Whalen (11th grade); Mayberry, Jimmy, Sr., individually and as next friend for his minor child Jimmy Mayberry, Jr. (11th grade); McGuire, Raymond and Melissa, individually and as next friends for their minor child Raymond Shawn McGuire, Jr. (9th grade); Motl, Becky Peek, individually and as next friend for her minor child Kristin Motl (12th grade); Mulson, Rhonda, individually and as next friend for her minor child Jimmy Lee Boyd, II (10th grade); O'Connor, Donna, individually and as next friend for her minor child Bonnie O'Connor (11th grade); Ousley, Bruce and June, individually and as next friends for their minor children Shannon Ousley (9th grade) and Bryan Ousley (8th

grade); Owens, Zack and Sherry Owens, individually and as next friends for their minor child Kristin Owens (10th grade); Parks, John and Belinda, individually and as next friends for their minor child Dana Parks (9th grade); Pashalidis, Chris and Donna, individually and as next friends for their minor children Chris Pashalidis (11th grade) and Danny Pashalidis (10th grade); Patterson, Lylia, individually and as next friend for her minor children Rick Patterson (12th grade) and Ginny Patterson (10th grade); Pennington, Bill and Karen, individually and as next friends for their minor child Cort Pennington (10th grade); Pourchot, Richard, individually (12th grade); Poutry, Mettra, individually and as next friend for her minor child Kim Poutry (11th grade); Pruitt, Gerald and Donna, individually and as next friends for their minor children Julie Pruitt (12th grade) and Janice Pruitt (10th grade); Rogers, Jamie, individually and as next friend for her minor children Jimbo Butler (9th grade) and Ashley Rogers (8th grade); Romero, Emerson, individually (12th grade); Seay, Greg, individually and as next friend for his minor child Bubba Seay (10th grade); Sharp, Brittany, individually (12th grade); Tabor, John and Debbie, individually and as next friends for their minor children Stephanie Tabor (12th grade) and Kristin Tabor (8th grade); Terry, Bruce and Julie, individually and as next friends for their minor child Bruce Terry III (12th grade); Tombrella, Leslie, individually and as next friend for her minor child Clayton Tombrella (8th grade); Vaughn, Michael and Debbie, individually and as next friends for their minor children Brandi Vaughn (12th grade) and Holly Vaughn (9th grade); Vaughn, Rick and Karen, individually and as next friends for their minor child Daniel Vaughn (10th grade); Vega, Maria, individually and as next friend for her minor child Stephanie Vega (11th grade); Wall, Alton and Diane, individually and as next friends for their minor child Matt Wall (11th grade); Ward, Marian, individually (12th grade) and her parents Robert and Marjorie Ward, individually; Whalen, Shawn, individually (12th grade); Whitton, Denise, individually and as next friend

for her minor child Lindsey Whitton (10th grade); Whyde, Lori, individually and as next friend for her minor child Sarah Whyde (9th grade); Williams, Sherry, individually and as next friend for her minor children Heather Williams (10th grade) and Lauren Williams (11th grade); Wollam, Susan individually and as next friend for her minor child Ashley Wollam (10th grade).

APPENDIX B

God
~~Heavenly Master~~ we come before
you today to thank You for bringing us
to this great occasion. Thank you for
leading, guiding and protecting each
and every one of us. ~~Thank you for~~
~~having a plan to prosper us and not~~
~~to harm us. Lord as we open this~~
~~ceremony we recognize before you our~~
~~sins and ask you to forgive us.~~ Be Sure
life's now opens before us and we must accept
responsibility for our decisions. ~~Help us~~
~~to look up for direction and follow~~
~~in your footsteps. Bless us as we get ready~~
from your help the class of 1999 to move into
this world ~~prepared~~ in strength and love for others.
~~Let us take the likeness of you and~~
set an example for the world to follow.
Thank you for your love and thank
you for your guidance and protection each
and every moment. ~~We love you.~~
~~In Christ's Name~~,
Amen

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APPENDIX C

AFFIDAVIT OF MARIAN WARD

The State of Texas)
County of Galveston)

BEFORE ME, the undersigned authority, on this day personally appeared Marian Ward, who, after being duly sworn upon her oath stated that she is a Plaintiff in the above styled and numbered cause, is of sound mind, seventeen years of age, and that she has personal knowledge of the statements made herein and the documents attached hereto, and that such statements are within her knowledge true and correct. Ward states the following:

My name is Marian Ward. I am seventeen years old and am a senior attending Santa Fe High School in Santa Fe, Texas. I am active in school activities and love my school and teachers. Some of the school activities with which I am involved include the following: Vice President of the Santa Fe High School Band; Section leader in the Santa Fe High School Band; Member of the National Honor Society; Treasurer of the National Honor Society; Secretary of the French Club; President of the Junior Statesmen of America; Treasurer of Turning Point; Lettered three times in academics; as of the last announcement of academic ranking, I was ranked tenth in a class of three hundred fifteen; G.P.A. of 3.65.

I have reviewed "Plaintiffs' Original Complaint And Application for Temporary Restraining Order, Preliminary Injunction And Permanent Injunction," and the factual statements contained therein regarding the events and circumstances involving me in this case are true and the two exhibits attached are true and correct copies.

In May, 1999, I was elected as the runner-up alternate for giving the student solemnization messages for the football games during the 1999/2000 school year. The election was fair and I saw no evidence of any SFISD school officials attempting to influence the election in any respect. At the time we had this election, the Fifth Circuit had ruled that our former football policy was unconstitutional and the students were well aware of this fact. After the ruling, the word "invocation" was dropped from the student ballot. I understood that this was so that it would be clear that the school was not attempting to suggest that students pray at the football games. I understood, and do understand now, that the word "message" does not have any religious component or suggestion of prayer and that the school district does not sponsor or endorse or even suggest religious speech as something that the district wants me or any other student to do. If I engage in any prayerful or religious speech, it will have nothing to do with feeling as if the school even wanted me to do that.

At no time has Santa Fe ISD, or any school official or teacher ever stated or implied, directly or indirectly, that I should pray at the football games. To the contrary, it is now clear that the school district does not want me or any other student to pray vocally at any school function.

On or about August 26, 1999, I heard about the statement made by our Superintendent Richard Ownby: "If they do pray, they would be disciplined just as if they had cursed." I understood and do understand this statement to be directed to whomever will be giving the football solemnization messages. Later comments by Mr. Ownby, including what he said to me, made it clear that this is who he was referring to. As far as I know, neither Mr. Ownby or

the school district has backed off of that stance as far as a student being disciplined if they pray.

On or about August 25, 1999, I heard that Stephanie Vega had resigned as the student to deliver the message solemnizations for the football games. Soon thereafter, I was asked (as the alternate runner-up) to take her place, and I accepted. I knew that the school policy says that I "may decide what message…to deliver." I have always interpreted this to mean that a student would actually have the opportunity to pick a message of the student's own choice, as long as the message was of a solemnizing nature.

At or around 3:00 p.m., August 31, 1999, without any prior notice or warning, I was summoned over the high school public address system to come to the principal's office and appear before Superintendent Richard Ownby and my high school principal Gary Causey. I was handed a document entitled "Guidelines for Student messages at Football Games (1999)" and other documents. (True and correct copies of these documents are attached to may affidavit as Exhibit "1"). I was instructed to read the Guidelines as Mr. Ownby and Mr. Causey watched me read. They then asked me if I had any questions. I was shocked what the Guidelines said. Although the Guidelines speak in terms of "a pre-game message…to solemnize the game, to encourage good sportsmanship and student safety, and to promote the proper environment for the competition," the Guidelines specifically discriminate against student initiated religious express as follows: "Prayers, blessings, invocations, and references to a deity are prohibited." The only other forms of student speech prohibited are messages that are "profane, obscene, or defamatory (slanderous)." I did not ask any questions but felt uncomfortable and pressured. I felt like the school wanted to tell me what to say rather than allowing me to choose and that my religious

beliefs were now in "the line of fire." I felt as if Mr. Causey and Mr. Ownby were asking me to choose between my own conscience and their authority over me. They made statements to me intended to persuade me to "go along with the Guidelines," as Mr. Causey stated.

During the same meeting, I was further instructed by Superintendent Richard Ownby and Gary Causey to write out the "message" that I would like to give at the football game and submit it to principal Gary Causey at 1:00 p.m., Thursday, September 2, 1999, "in case anything needs to be edited [by the school government] before Friday's game," as Mr. Causey put it. I understood this to mean that the meeting would be for the purpose of Mr. Causey censoring and/or scripting my message to eliminate any "prayers, blessings, invocations, and references to a deity." Mr. Ownby then said that if I wanted some help wording my message so as to say it differently, I should go talk to Ms. Voight (the coordinator for English, Social Studies and the Gifted and Talented Program)."

On September 1, 1999, while at school, I was approached by three teachers (two of whom had taught me). The three teachers are ones whom I particularly admire and respect. They told me that they had seen Mr. Causey, that he was distraught, and that he could loose his job if I did not follow the Guidelines that had been given me. They added that Mr. Causey had a family and need to keep his job. These are teachers whom I greatly respect and who I do not want to disappoint. I felt under some pressure from the conversations. I do not know if Mr. Causey encouraged these teachers to talk to me; but these are teachers whom I really, really do not want to disappoint. After these conversations, I felt like going home. I was unable to concentrate and really felt disturbed.

The recent statements, actions, and threats by the Superintendent about discipline, have intimidated me and are having a really adverse effect on me with regard to doing what my conscience and beliefs tell me that I should do. The school is putting me in a position that seems so hostile toward my spiritual beliefs and hostile toward the general right of free speech. I have been put in a position by the school where I am afraid to pray at the game Friday night. The message from the school to me is that my faith is not welcomed in the school and that there is something wrong or sinister about prayerful speech. I thought the Constitution protected my right to prayerful speech whenever I am allowed to speak. The school has made threats, directed to me, that if I choose to pray at the game, I will be disciplined. Why have school officials become hostile toward student religious expression? I feel that I am being intentionally intimidated and threatened by school officials.

My choice of "message" for solemnizing the football games this season is to give a "message" containing prayerful content, beginning with the first game on September 3, 1999, as well as at each of the home games thereafter. I believe that a prayer is the best way to solemnize, formalize and dignify almost any event, including sports events (where a need for safety is especially important). Our game this Friday night is the first game of the last season of the millennium—a solemn, once in a lifetime event. Our schools need God more than ever. And, I would like to recount the following story to make my point:

The Declaration of Independence had been signed and a very bloody war had been fought with Great Britain. But now the war was over, America had won, and it was now time to form the new government and write the laws. As the founding fathers gathered together to draft a Constitution, Benjamin Franklin reminded his friends of the importance of

prayer and chastised his fellow patriots for having ceased to offer public prayers since the war had been won. On the floor of the Constitutional Convention, Franklin rose to his feet and said:

> "In the beginning of the contest with Great Britain when we were sensible of danger we had daily prayer in this room for divine protection. Our prayers were head and they were graciously answered...and have we now forgotten this powerful friend? I have lived, sir, a long time, and the longer I live the more convincing proofs I see of this truth--that God governs in the affairs of men. We have been assured, sir, in the sacred writings, that "Except the Lord build the house, they labor in vain that build it." I firmly believe that without His concurring aid we shall succeed in this political building no better than the builders of Babel."

I believe Benjamin Franklin's statements to be just as valid today as they were then. Without the concurring aid of God, we shall succeed in building safe schools in America no better than the builders of the Tower of Babel. God should be publicly and vocally recognized everywhere, including schools--as long as it is genuinely student initiated and not being pushed by the school. My message Friday night will be genuinely student initiated (except for the government being against it).

I do not want to violate school directives. I have always believed in being obedient to my parents, to my teachers, to school officials and to all those in authority over me. But I believe that the school is wrong in this instance.

The United States Constitution cannot mean this. But, is anyone going to stand up and do the right thing?

On Thursday, September 2, 1999, at about 8:15 a.m., during a class, I was called out of my class to the hallway by a teacher (not the teacher of the class that I was in) to talk to her. This is a teacher I admire and respect and is another teacher who I would not want to disappoint by my conduct. She brought up Mr. Causey and the problems that might be caused him if I did not go along with the Guidelines. The teacher then quoted from the Bible some verses about "render unto Caesar what is Caesar's and unto God what is God's" and said that the present situation concerned Caesar. She warned me and said that I needed to be careful about praying. I felt extremely intimidated and upset and had to call my parents to talk to them about it.

Marian Ward

SUBSCRIBED AND SWORN TO BEFORE ME on this 2nd day of September, 1999, to certify which witness my hand and official seal.

Sheryl L. Caldwell
Notary Public in and for
the State of Texas, County of
Galveston

My Commission Expires:
July 9, 2001

APPENDIX D

Santa Fe High School
P.O. Box 370
Santa Fe, Texas 77510-0370
Phone (409) 925-3526 Ext. 200 Fax (409) 925-4002

Guidelines for Student Messages at Football Games (1999)

A student who is selected by his or her peers to deliver a pre-game message at a home varsity football game must comply with the following rules, which will be in effect during the 1999 football season.

1) The purpose of the message is to solemnize the game, to encourage good sportsmanship and student safety, and to promote the proper environment for the competition. The message opportunity also may be used to welcome or greet the fans and the opposing team and/or commend them for their achievements. Consistent with the educational mission of the Santa Fe ISD, the pre-game message should be respectful, encouraging, and positive. The entirety of the speaker's message should serve these goals.

2) Prayers, blessings, invocations, and references to a deity are prohibited. (*See Doe vs. Santa Fe Independent School District, 168 F.3d 806 (5th Cir. 1999).*

3) The message must not be profane, obscene, or defamatory (slanderous).

APPENDIX E

STUDENT ACTIVITIES: FN (LOCAL)
PRE-GAME CEREMONIES AT FOOTBALL GAMES

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing.

SANTA FE ISD GRADUATION POLICY

Dated: July 1995

The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect by secret ballot, from a list of student volunteers, students to deliver invocations and benedictions for the purpose of solemnizing their graduation ceremonies.

If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT and MARJORIE WARD, individually and a/n/f of MARIAN WARD, A Minor	)	
vs.	)	NO. G-99-556
	)	SEPTEMBER 3, 1999
SANTA FE INDEPENDENT SCHOOL DISTRICT	)	

HEARING BEFORE THE HONORABLE SIM LAKE
EXCERPT

APPEARANCES:

For the Plaintiffs:	Mr. Kelly J. Coghlan Coghlan & Associates 505 Lanecrest, Suite One Houston, Texas 77024-6716
For the Defendant:	Ms. Lisa Brown Bracewell & Patterson 711 Louisiana, Suite 2900 Houston, Texas 77002-2781
Court Reporter:	Bruce Slavin Certified Court Reporter

THE COURT: All right. I am prepared to rule.

The First Amendment to the Constitution says "Congress," which means any level of government, "shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or the press or the right of the people to peaceably assemble or to petition the government for a redress of grievances. The government may not restrict religious speech based on viewpoint when the government has created a forum for the expression of privately held views."

The Santa Fe Independent School District has created a forum by its policy allowing pre-game ceremonies at football games at which elected students are allowed to deliver a brief message during the pre-game ceremony. The policy permits the expression by the students of privately held views. Having created a forum for the expression of private views by students, the School District may not impose prior restraints on the student's choice of her expression of privately held views.

If, as it appears from this record, secular speech is allowed at games over the public address system by students, then the Court concludes that the "free speech" clause of the Constitution prohibits the School District from discriminating against similar speech simply because it contains a prayerful component freely chosen by the student, even one that invokes a deity. Even in a non-public forum a government cannot discriminate against speech because of the viewpoint expressed by the speaker.

The "establishment" clause of the First Amendment requires neutrality by government in matters of religion. Just as a school policy requiring student prayer would run afoul of the "establishment" clause, a school policy prohibiting

prayer also runs afoul of the "establishment" clause because it amounts to state-sponsorship of atheism, i.e., state establishment of disbelief in a God instead of belief in a God.

If a student may select a non-religious solemnization, then neutrality requires that a student may also select a religious solemnization without government interference.

In this case the Court is persuaded that the Plaintiff is entitled to injunctive relief. Plaintiff has established a probable right to success on the merits because the recently imposed guidelines for student messages violate the Plaintiff's rights to freely exercise speech under the First Amendment and violate the "establishment" clause by resulting in state sponsorship of atheism.

By prohibiting a student at a publicly sponsored forum from voluntarily and freely praying, giving a blessing, giving an invocation or making any reference to a deity, the new guidelines clearly prefer atheism over any religious faith. Since Defendant does not dispute that Miss Ward was cautioned to follow the policy, Plaintiffs have shown immediate and irreparable injury in the form of a prior chilling and restraint of the plaintiff's right of free speech.

Unless an injunction is entered now, Marian Ward will be forced to abandon her conscience and to abandon her constitutional right to engage in prayerful speech in a forum where non-prayerful secular speech is permitted because of the chilling effect of the Defendant's policies. This constitutes an irreparable injury. It is not the type of injury that could ultimately be compensated by money damages. If Miss Ward were not allowed to freely exercise her rights of speech tonight and she ultimately prevailed in this case, it would be difficult, if not impossible, to quantify any

monetary damages that she has suffered. Also, the public interest favors an injunction since the public interest favors protecting a plaintiff's rights to exercise rights given her by the framers of the Constitution in the First Amendment.

Look at the proposed temporary restraining order. Do you have a copy?

. . . .

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT and MARJORIE WARD, INDIVIDUALLY AND AS A/N/F OF MARIAN WARD, A MINOR	)	
Plaintiffs,	)	
vs.	)	Civil Action No. G-99-556
	)	JURY REQUESTED
SANTA FE INDEPENDENT SCHOOL DISTRICT	)	
Defendant.	)	

TEMPORARY RESTRAINING ORDER

BE IT REMEMBERED THAT ON THE __ day of September, 1999, came on to be heard Plaintiffs, Robert and Marjorie Ward, individually and as next friend of their daughter Marian Ward, a minor, Motion For Temporary Restraining Order filed pursuant to Fed.R.Civ.P. 65 (b) requesting the Court to enter a Temporary Restraining Order, restraining Defendant, Santa Fe Independent School District ("SFISD"), and all persons acting in concert with it, from various actions as are fully stated in Plaintiff's Motion.

The Court, after considering the Affidavits, the factual statements in the Complaint and Motion, the documents, and the law is of the opinion that sufficient grounds have been stated by Plaintiffs and that a temporary restraining order should issue.

It is therefore Ordered that Defendant Santa Fe Independent School District, and all persons acting in concert with it are hereby enjoined and restrained from doing any of the following, directly or indirectly: promulgating or putting into effect the "Guidelines for Student Messages as Football Games (1999)"; retaliating against Ward or her parents or making or carrying out threats that Ward will be disciplined for prayer or other religious expressions in connection with her choice of a solemnizing "message" for the football games; requiring Ward to submit a draft of her "message" to SFISD for purposes of SFISD's "cleansing" the message of religious or prayerful content; deleting, censoring, scripting or in any way making comments to the words Ward will speak as her choice of a solemnizing message for the football games in so far as such action if for the purpose of eliminating Ward's solemnizing religious expressions; preventing Ward from solemnizing the football games this season, as she was elected by the students to do; interrupting Ward's message or turning the microphone off as she delivers her message (if such actions are for the purpose of silencing prayerful or religious speech); taking or threatening any adverse or retaliatory action against Ward by reason of her delivering a courteous, reverent, solemnizing "prayer, blessing, invocation, or reference to a deity" as her choice of message to solemnize the football games this season.

This Order shall be effective immediately.

Sim Lake
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT WARD,	§	
MARJORIE WARD, AND	§	
MARIAN WARD,	§	
Plaintiffs,	§	
vs.	§	Civil Action No. G-99-556
	§	
SANTA FE INDEPENDENT	§	
SCHOOL DISTRICT	§	
Defendant.	§	

PRELIMINARY INJUNCTION

BE IT REMEMBERED that, on September 30, 1999, the parties appeared before the Court at which time the Plaintiff's previously filed application for preliminary injunction was discussed and considered. The parties informed the Court of the following: there are three remaining home varsity football games at which Plaintiff Marian Ward is scheduled to give a pre-game message; the three games will be held during the month of October 1999; in addition to this lawsuit, the Defendant currently is a party to other litigation involving the issue of student speech at school functions, *Jane Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999) (petition for writ of *certiorari* filed on July 6, 1999); the parties believe that the Supreme Court will act to grant or deny the petition in the *Jane Doe* case in the near future; the Defendant desires to minimize expense, disruption, and inconvenience while the Supreme Court is considering the petition for writ of *certiorari*; and that, due to these circumstances, the parties are upopposed to the Court's maintaining the status quo through the entry of a

preliminary injunction to be in effect through the end of the current football season.

Considering the above and for the reasons stated in the Court's ruling on the record on Sept. 3, 1999 at the hearing on Plaintiff's application for temporary restraining order, such reasons being incorporated by reference herein, the Court, having considered the pleadings on file and statements of counsel, issues the following preliminary injunction:

It is Ordered that Defendant Santa Fe Independent School District, and all persons acting in concert with it are hereby enjoined and restrained from doing any of the following, directly or indirectly:

(1) promulgating or putting into effect Guideline No. 2 as stated in the Defendant's "Guidelines for Student Messages at Football Games (1999)";

(2) retaliating against Ward or her parents or making or carrying out threats that Ward will be disciplined for prayer or other religious expressions in connection with her choice of a solemnizing "message" for the football games;

(3) requiring Ward to submit a draft of her "message" to SFISD for purposes of SFISD's "cleansing" the message of religious or prayerful content; deleting, censoring, scripting or in any way making comment to the words Ward will speak as her choice of a solemnizing message for the football games in so far as such action is for the purpose of eliminating Ward's solemnizing religious expressions;

(4) preventing Ward from solemnizing the football games this season;

(5) interrupting Ward's message or turning the microphone off as she delivers her message (if such actions are for the purpose of silencing prayerful or religious speech); and

(6) taking or threatening any adverse or retaliatory actior. against Ward by reason of her delivering a courteous, reverent, solemnizing "prayer, blessing, invocation, or reference to a deity" as her choice of message to solemnize the football games this season.

Signed October 6, 1999.

Sim Lake
United States District Judge

Jan 31 2000

(22)

No. 99-62

Supreme Court U S
F I L E D
JAN 31 2000
CLERK

In The

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF AMICUS CURIAE FOR THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, J.M. DAWSON INSTITUTE OF CHURCH-STATE STUDIES, AND GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, IN SUPPORT OF RESPONDENTS

MELISSA ROGERS
Baptist Joint Committee
On Public Affairs
200 Maryland Ave., N.E.,
Washington, D.C. 20002-5797
(202) 544-4226

DEREK H. DAVIS*
Baptist Joint Committee
On Public Affairs
J.M. Dawson Institute
of Church-State Studies
Baylor University
P.O. Box 97308
Waco, Texas 76798-7308
(254) 710-1510

**Counsel of Record*

Counsel for Amici

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE AMICI[1]

Amici are religious organizations serving persons of deep religious faith who believe in the significance and efficacy of prayer. Amici write chiefly to emphasize the damaging effect of government-endorsed religion on religious liberty and on religion itself. We leave the briefing of other legal arguments to the parties and other amici.

The Baptist Joint Committee on Public Affairs is composed of representatives from various cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than amici, its members, and its counsel has made a monetary contribution toward the preparation and submission of this brief.

autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The J.M. Dawson Institute of Church-State Studies is a free-standing unit within Baylor University, the largest Baptist university in the world. The Institute offers M.A. and Ph.D. degrees in Church-State Studies, conducts research and publishes books on church-state relations and religious liberty in national and international contexts, publishes the internationally known *Journal of Church and State*, maintains the largest research library in the world pertaining to church-state relations and religious liberty, and sponsors conferences and lectureships on various church-state themes.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 41,000 congregations with more than ten million members worldwide. The North American Division of the General Conference administers the work of the church in the United States, Canada, and Bermuda, and represents more than 4,300 congregations in the United States with nearly 800,000 members. The church strongly supports the twin concepts of free exercise of religion and the separation of church and state and actively promotes those ideals through its bi-monthly *Liberty* magazine.

SUMMARY OF THE ARGUMENT

This case involves a school district's policy authorizing and encouraging school prayer. It is not fundamentally a case concerning free speech, as Petitioner

contends. Santa Fe ISD has a long history of allowing students to recite overtly Christian prayers during graduation ceremonies and before football games. It was only after litigation commenced in this case that the Santa Fe school board decided to pass a policy concerning football game prayers. As the litigation evolved, the Santa Fe ISD drafted a policy covering "brief invocations and/or messages" prior to football games. Much of Petitioner's brief is dedicated to its assertion that the language "or message" transformed this school policy from one authorizing prayer to one that is content neutral by encompassing both secular and religious speech. Petitioner essentially wants this Court to concentrate on form over substance – to ignore the factual truth that this case is all about a public school district trying to find a constitutional way to authorize prayers delivered by students prior to school football games. Here, as in *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 524 (1993), the policies "in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom." The Fifth Circuit recognized the true nature of the school district's policy, calling it a "policy to address football game invocations." *Doe v. Santa Fe ISD*, 168 F.3d 806, 812 (1999).

Because school prayer is at issue, this case should be analyzed under the Establishment Clause. Amici believe that the Santa Fe ISD prayer policy violates the Establishment Clause because it constitutes state endorsement of religion, coerces the citizens (especially the students) that

attend the football games to participate in religious activity, and violates the test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Amici fully concur with the holding in *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990), that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Private speech endorsing religion clearly would include prayers offered individually or by groups of fans and students (including football team members) before, during, and after the game, or prayers offered by those attending the game during a neutral moment of silence. But the Santa Fe prayer policy clearly encourages "government speech endorsing religion."

Additionally, Amici are deeply concerned about the mixed message Santa Fe ISD sends to its students about religion. On the one hand, its policy stands as an endorsement of prayer – a quintessential religious act. But on the other hand, the school district's policy denigrates and trivializes the act of prayer by portraying an act of religious devotion as a quasi-secular ceremonial practice. Even more dangerous, the policy invades the sacred realm of private religious expression by telling students that their prayers must be nonsectarian and nonproselytizing, which equates to state monitoring and censorship of religion. For all of these reasons, Amici believe that the judgment of the Fifth Circuit should be affirmed, and that the Santa Fe ISD policy should be held unconstitutional.

ARGUMENT

I. SANTA FE ISD'S POLICY OF ALLOWING STUDENT-LED PRAYER AS PART OF THE PRE-GAME FESTIVITIES VIOLATES THE ESTABLISHMENT CLAUSE

Santa Fe Independent School District ("Santa Fe ISD") is a political subdivision of the State of Texas. Its governing body is an elected, seven member Board of Trustees. The trustees are responsible for overseeing the public education of some 4000 students that live in a small South Texas community. During the 1992-93 and 1993-94 school years, the Santa Fe ISD permitted students to read overtly Christian prayers over the public address system prior to all home football games. *Doe*, 168 F.3d at 810 & n.3. No written policy regarding these prayers existed prior to the underlying litigation in this case.

During the course of this lawsuit, the Santa Fe ISD passed a policy regarding invocations during the pre-game festivities ("prayer policy") which provides the following:

> The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation

> will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

The board also issued a contingent policy concerning the content of invocations or messages that students should give. The contingency provided that should the Santa Fe ISD be enjoined by a court order (as subsequently happened at the federal district court level), the policy then would include a requirement that students give a "nonsectarian, nonproselytizing" prayer or message.[2]

Thus, the Petitioner's current prayer policy, challenged herein, requires all student prayers to be nonsectarian and nonproselytizing.

Amici believe that Santa Fe's pregame prayer policy violates the endorsement, coercion, and *Lemon* standards developed by this Court for analyzing alleged violations of the Establishment Clause.

A. The Endorsement Standard

The Establishment Clause prohibits the state from taking action which endorses or disapproves of religion. The standard is whether a reasonable person would perceive from the government's activity that religion is being

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[2] This specific content limitation language was chosen to comport with *Jones v. Clear Creek ISD*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2950 (1993).

endorsed or disapproved by the state. *County of Allegheny v. ACLU*, 492 U.S. 573, 630-31 (1989) (O'Connor, J., concurring). Government actions endorsing religion are dangerous because they "send[ ] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). Amici believe that the Santa Fe ISD unconstitutionally endorses religion by including prayer within its pregame football festivities.

Petitioner insists that there is no state endorsement of religion when it allows students to offer brief prayers before football games. But Petitioner is wrong. After sitting in the high school football stadium, hearing the announcer call the crowd to order and introduce the student offering the prayer, watching the crowd stand together in an attitude of reverence, and listening to the prayer over the school's loud speaker system, any reasonable observer would inescapably conclude that the Santa Fe ISD endorses the religious act of prayer.

Amici fully concur with the holding in *Board of Education v. Mergens*, 496 U.S. 226 (1990) at 250, that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Amici contend, however, that the prayers offered by students at Santa Fe football games go beyond protected private speech and free exercise of religion. A full evaluation of the context of the prayers and the school district's involvement in the prayers leads to the inescapable conclusion that the

prayers are the equivalent of "*government* speech endorsing religion." And Petitioner's policy of providing a program of pre-arranged, programmatic prayer at football games is categorically different from situations in high school settings where student religious speech is spontaneous or random, such as when a student chooses to make religious statements during her one-time valedictory address. The former is clearly state endorsement of religion; the latter is protected private speech.

Petitioner believes that it has so removed itself from pregame prayers that it cannot be said to be endorsing religion. But in fact, the school maintains complete control of the event. First of all, Santa Fe ISD created the prayer policy and the mechanisms by which the students decide whether the prayer will occur. The policy states that an election will occur "[u]pon advice and direction of the high school principal." The school system places its authority behind the selection procedure by ensuring that the voting results are carried out in accordance with school district policy. Furthermore, the school system owns, maintains, and controls the use of the physical facilities where the football game is played. Uniforms worn by student athletes and members of the cheerleading squad, band, drill team, etc., are paid for with school district monies. All revenues from the game, except those shared with the opposing school, benefit the Santa Fe ISD. The scheduling of the game, the game itself, and all activities associated with the game are a part of the Santa Fe public school machinery. The school system also owns, maintains, and regulates the use of the loud speaker system – including allowing only authorized persons to use the microphone during pregame festivities. The

degree of Santa Fe ISD's involvement in the pregame prayers – including its monitoring of the student offering the prayer and the content of the prayer itself – means that the prayers themselves bear the imprint of the school district, and therefore the state's endorsement.

B. The Coercion Standard

This Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1991), underscored the fact that government may not coerce directly or indirectly any citizen to support or participate in religious exercises. The specific question addressed in *Weisman* was whether the religion clauses of the First Amendment were violated by a public school system's practice of inviting local clergy to offer invocations and benedictions as part of middle and high school graduation ceremonies. Although the Court was reviewing a factually different scenario – school selection of clergy to lead prayer at graduation versus student-led prayers at pregame festivities – many of the Court's observations apply equally to this context.

This Court determined that the graduation prayer policies of the Providence, Rhode Island School District violated the First Amendment by creating significant and pervasive government involvement with religious activity. 505 U.S. at 587. Particularly significant was the potential for religious divisiveness between students and parents and the school because there was an "overt religious exercise in a secondary school environment where . . . subtle coercive pressures exist" and where objecting students have no real alternative to participation other than feigning participation or not attending at all. *Id.* at

588. The Santa Fe ISD seeks to differentiate its practices from those of the Rhode Island School District which this Court invalidated. First, Petitioner contends that no students are coerced to participate because the students vote first on whether to have the prayers and then on the student to lead the invocation. The student voting procedure in no way lessens, however, and in some ways increases, the coercive nature of the school district's policy. Using the voting process to advance the religious views of the majority of students against the conscience of the minority violates a primary purpose of the Establishment Clause – to protect the rights of members of minority religions. As this Court held in *West Virginia v. Barnette*, 319 U.S. 624, 638 (1943), "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." Under Santa Fe's voting procedure, it is virtually assured that members of minority religions will never have the opportunity to offer a pregame prayer. The threat of government-sanctioned majoritarianism to human freedom was well-summarized by James Madison:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.[3]

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[3] James Madison to Thomas Jefferson, October 17, 1788, reprinted in *The Essential Bill of Rights*, Gordon Lloyd et al. eds. (University Press of America, reprint, 1998), 326.

Petitioner also argues that football games are voluntary, non-academic activities without coercive effect upon students and other persons attending football games. Petitioner focuses attention on the rights of the praying student – arguing that a student should be free to step up to the microphone and say, or pray, whatever the student desires. The problem with this analysis is that it completely ignores the rights and interests of all of the other students, teachers, and fans who come to the game, not to pray or engage in religious activity, but to enjoy a high school athletic event. As this Court recognized in *Weisman*, subtle coercive pressures exist in the context of school activities. Young people, particularly adolescents, are especially sensitive to peer pressure.[4] To emphasize the technical fact that attendance at a football game is voluntary is to ignore the realities of the situation. In the first place, attendance is not always voluntary in the strict sense. Football players must attend the game. Attendance is also mandatory for the student equipment managers, members of the band, the cheerleaders, the drill team, the pep squad, or teachers who must supervise the events. As for the rest of the students, while attending a football game may not be as momentous as attending one's high school graduation, going to high school sporting events

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[4] Justice Kennedy, in his concurring opinion in *Board of Education v. Mergens*, 496 U.S. 226 (1990) at 261-62, described the test for coercion in this way: "The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity. This inquiry, of course, must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw."

(which include special annual events like homecoming), certainly provides those "intangible benefits which have motivated the student through youth and all her high school years." *Weisman*, 505 U.S. 595.

High school football games are athletic events sponsored by the school district for students. With the exception of the coaching staff, the participants are students. While not every student attends every game, the school nevertheless encourages students to attend such events as part of the overall educational experience. Going to the game can become essentially mandatory, especially in the social atmosphere existing in small Texas communities and elsewhere, where high school football frequently engenders fierce loyalty of the students, their families, and even the community at large. Public schools, through pep rallies, fundraisers, and other school-sponsored events, work to make sure that virtually all students attend football games, either as participants or as fans. But in the Santa Fe School District, if students wish to attend a game – as a player, a band member, a cheerleader, or as an admission-paying fan – they must also participate in the religious exercise of the pregame prayer, if the majority of students voted to have one. In sum, the Santa Fe policy coerces non-consenting students to participate in religious exercises.

Imagine the predicament of a high school student desiring to attend the Friday night game, but not wanting to hear a prayer over the loud speaker. She desires to support her team and show her "school spirit" – as urged that afternoon by the principal, coaches, team, and cheerleaders during the school pep rally. Furthermore, her boyfriend is on the football team, her best friend is on the

pep squad, and her little brother is in the marching band. In other words, the student has compelling reasons to attend the game, some personal and some urged directly by the school itself. The student takes her place in the stands among family and friends that are present for similar reasons. All watch and participate in the pregame festivities. The marching band's pregame program includes the school's fight song and alma mater. Then the announcer asks the crowd to stand, if they are not already, and to quiet down. The band and ROTC color guard leads the crowd in the national anthem. The crowd then is asked to remain standing, and a schoolmate is introduced as the student chosen to offer the pregame invocation. The non-consenting student, surrounded by her friends, schoolmates, family, family of her friends, teachers, and administration, is now caught: she is caught between the Scylla of standing while feigning participation in the religious exercise (thereby violating her own religious conscience) and the Charybdis of obvious non-participation – by refusing to bow her head, sitting down in front of everyone or by physically leaving the stands.[5]

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[5] Asking a teenager to assert her dissent to a public exercise of religion in front of her classmates is difficult enough, but asking her to assert her dissent in front of adults, including those in direct authority over her, is simply beyond the bounds of reasonableness. The difference in the age of the persons involved differentiate this case from *Marsh v. Chambers*, 463 U.S. 783 (1983). Opening a state legislative session with prayer differs vastly from beginning a high school football game with prayer. The influence of the legislative prayer upon the consciences of the adults present must be differentiated from the influence of prayer on the teenagers and children present who naturally perceive their school officials as having

The state should not force these options on a socially anxious, peer-pressure sensitive, lacking-in-self-confidence adolescent – surely an apt description of many teenagers.

To ask our young dissenter to act according to her conscience in front of peers and adults is to ask her to fight against the strongest social forces in her young life. We have not progressed so far in our collective religious tolerance that we can ensure the student who publically dissents from the majority's religious views that she will not meet with ridicule, if not cruelty. If nothing else, this is what the First Amendment protections mean – that the state should not and cannot place a person of tender age in the untenable position of having to choose between violating her conscience by feigning participation in a state-endorsed, public religious exercise, or making a maverick public assertion of dissent by refusing to participate. The mere fact that students were forced to bring

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sanctioned the prayer, even though a student is at the microphone. Justice Souter in *Weisman* also differentiated *Marsh*, since in the prayers used to open legislative sessions, government officials are invoking spiritual blessings for their own benefit, without directing any kind of religious message at the constituents they represent. 505 U.S. 630, n. 8. Similarly, in *Allegheny*, Justice Blackmun noted: "Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct." 492 U.S. at 603, n. 52. And certainly no one can claim that the practice of offering pregame prayers is an accepted tradition dating back to the founding era, as was legislative prayer. *Marsh*, 463 U.S. at 786.

this suit anonymously suggests that they feared the ridicule and ostracism that would attend the revealing of their identity.

Finally, Petitioner ignores the fact that there are two other groups of young people present at the Santa Fe football games who have no opportunity to vote or to have any say in the matter of pregame prayers. First, there are the students of Santa Fe ISD's primary, intermediate, and junior high schools. These students in this small community are no doubt urged to attend varsity football games; many may have older brothers or sisters involved. Not only are they excluded from the high school's voting procedure, they are unlikely to understand the distinctions of the school board's policy. They hear only the prayer. But the second, and perhaps more important, non-voting group consists of the players, band members, cheerleaders, and fans from the opposing school. They not only have not participated in the vote, they probably know nothing about the school board's policy. All of the young people in these two groups form a captive audience. By their attendance at high school football games, they are coerced to participate in the prayers offered at the Santa Fe games.

C. The *Lemon* Standard

For over twenty-five years this Court has frequently followed the test set out in *Lemon v. Kurtzman* as a tool of Establishment Clause analysis. *Lemon*, 403 U.S. 602 (1971). For a government policy or activity to withstand a constitutional challenge, it must have a secular purpose, its primary effect must neither advance nor inhibit religion,

and the policy or practice must not foster excessive entanglement between government and religion. 403 U.S. at 612-13.

Petitioner claims that its prayer policy has as its primary secular purpose the encouragement and accommodation of student speech (Petitioner's Brief at 23). Petitioner misplaces its reliance upon language in *Widmar v. Vincent*, 454 U.S. 263 (1981). *Widmar* involved an open forum created by a public university when it permitted student groups to use its facilities.[6] This Court suggested that creation of such a forum, in conjunction with a policy of nondiscrimination against religious speech, could be a secular purpose. 454 U.S. at 271. However, Santa Fe ISD's factual situation is not even remotely similar. The holding in *Widmar* in no way justifies Santa Fe's prayer policy. Time reserved during pregame festivities for student-led prayer does not equate to the type of open forum created by the university when it opened its buildings so that groups of students could come together to exchange ideas. *Id.*, n.10. The Santa Fe ISD allows only one student at a time to use its public address system at the school's football stadium in order to lead a crowd of people, many of whom had no vote in the matter, in religious activity. Petitioner cannot take refuge in the secular purpose found to exist in *Widmar*.

As an additional secular purpose for its policy, Santa Fe ISD points to the four-fold purpose of solemnizing the

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[6] At issue in *Widmar* was whether a university which made its facilities generally available to student groups for their activities could exclude religious groups from likewise using campus buildings.

occasion, expressing confidence in the future, encouraging the recognition of what is worthy of appreciation in society, and fostering an atmosphere of sportsmanship at football games. The school district does not indicate how the pregame prayer accomplishes these four purposes, and it is unclear how the student invocation may do so. While a pregame prayer may be used to call to order and silence the boisterous crowd of students, family, and fans, and while the prayer indeed may be used to invoke a blessing and request safety for the young players engaged in a relatively physical and sometimes dangerous sport, these ends are insufficient to establish a secular purpose for prayer. A crowd may be silenced by the singing of the national anthem or the school's alma mater. Vocal prayer is not necessary to call the crowd to order.

Undoubtedly safety of the players and good sportsmanship are chief concerns for all present at a high school football game. Yet the fact that Santa Fe ISD deems it important to use a prayer to reach these ends underscores the truly religious intent of this activity. Those believing in prayer's power to invoke God's protection and blessing clearly ascribe to prayer a divine purpose, not a secular one.

In violation of the second prong of the *Lemon* test, Santa Fe ISD's prayer policy also has the primary effect of advancing religion. The history of this school district's policies regarding prayer at both graduation and football games clearly indicates that the goal always has been, and still is, to permit religious prayers at these school functions. Prior to the underlying litigation, the prayers given at Santa Fe's graduations and football games were

not only significantly religious, but overtly Christian. *Doe*, 168 F.3d at 810 & n.3. Prayers were delivered by a student chaplain. *Id.* at 810 n.4. Why would prayers be delivered by a "chaplain" if not to advance religion? The first drafts of the school board policies regarding football games referred only to invocations and benedictions. *Id.* at 811. While the current policy regarding football games refers to a "brief invocation and/or message," it is clear from the historical context that the school district contemplated that religious prayers would be offered.

Petitioner likens the opportunity it gives students to pray prior to football games to the forum reviewed in *Mergens*, in which a secondary school officially recognized student groups and clubs and permitted them to meet after hours on school premises. The opportunities for student speech are significantly different in the two situations. In *Mergens*, the high school encouraged student speech by allowing the various voluntary student groups and clubs which students joined to meet on the school campus. The present case involves prayer given by students to a captive audience (players, cheerleaders, band members, pep squad members, drill team members, and ticket-purchasing fans) who have come to particpate in an athletic event. In *Mergens*, the students attended a planned *religious* event in which all consented to the planned religious activites, but here the students attend a planned *athletic* event and are coerced to participate in religious activity to which not everyone has given their consent.

Santas Fe's prayer policy also causes an excessive entanglement between religion and government.[7] Seeking to "hedge" its bets as to the constitutionality of its prayer policies, Santa Fe issued an alternate policy requiring that prayers offered by students in the pregame festivities must be "nonsectarian and nonproselytizing." Any monitoring of the content of the students' pregame prayers constitutes significant involvement of the school district in the pregame invocations. Under this policy, school officials are responsible not only to ensure that the results of the student vote are carried out, but also that the selected student prays a "nonsectarian and nonproselytizing" blessing. In all likelihood, in addition to this monitoring, the school, via the administration or teachers, will have to actually instruct the students as to what constitutes a nonsectarian, nonproselytizing prayer – presumably in keeping with the schoolboard's own determination. Invariably, the courts will end up reviewing piecemeal the prayers recited by the students at the games.

In his concurrence in *Weisman*, Justice Souter noted that the nonpreferentiality of each individual prayer must be judged by its text. The prospect of the courts reviewing every prayer, some dozen or so a season, is certainly a daunting one and serves to illustrate the inevitable entanglement resulting from the school district's policy. 505 U.S. 617.

As Justice Kennedy noted in *Weisman*, the school system's efforts to direct the content of prayers may be a

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[7] *Agostini v. Felton*, 117 S. Ct. 1997 (1997).

good-faith attempt to ensure that sectarianism is absent from the event, but it does not resolve the dilemma caused by such invasive participation by the school. 505 U.S. 588-89. The spectre of the school's invasion into matters that are purely religious underscores why Santa Fe ISD's policy runs afoul of the Establishment Clause.

II. THE POLICY OF CIVIC PRAYER CHAMPIONED BY SANTA FE DENIGRATES GENUINE RELIGIOUS FAITH AND ITS PRACTICES

A. State Involvement in Prayer Denigrates Religion

Seeking to make its policy of pregame prayer constitutional, the Santa Fe ISD essentially tries to "secularize" the sacred act of prayer – to make it socially acceptable within the public context of high school football games. But prayer cannot be secularized. Any attempt to do so denigrates religion. Prayer is, by its very nature, a religious act. Unlike the Christmas holiday, there are not both secular and sacred elements in the act of prayer. This Court has recognized this fact many times, but no more succinctly than in the words of Justice Hugo Black: "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause." *Engel v. Vitale*, 370 U.S. 421, 430 (1962). Justice Black's conclusions are true because prayer cannot be sufficiently secularized or neutralized to change it into anything other than what it is – an act of religious devotion and supplication seeking divine intervention in human affairs.

The sanctity of prayer is preserved best by keeping the state – including school districts – out of the business of endorsing and supervising the public prayers of its students. Rejecting Santa Fe ISD's policy of having pregame prayers does not mean that students may not pray during school hours and at school-related events, including athletic events. If the school district policy is rejected as unconstitutional, students and fans of Santa Fe will not be deprived of entering into meaningful prayer that sportsmanship will be exhibited, or that those on the football field will remain free from injury, or that fans' return trip home will be uneventful. These prayers can be offered individually or by groups of fans and students (including football team members) before, during, or after the game, as protected private speech. If the loud speaker is to be used, an announcement before the game calling for a moment of silence, which could be used for prayer by those who wish to pray, would be altogether appropriate. *Wallace v. Jaffree*, 472 U.S. 38 (1995), protects a policy of silent meditation if not implemented strictly for religious reasons. Such a practice at high school football games would be far more consistent with the *Lemon*, non-endorsement, and non-coercive requirements that Petitioner unconvincingly argues are met by the Santa Fe prayer policy. Many school districts in Texas, in light of the Fifth Circuit's ruling in the present case, have already ended their Santa Fe-like practice, adopting in its place the "moment of silence" practice, believing that it is sanctioned by this Court.

Much of what fuels the debate over religious activity in the public schools is the belief that America is in significant moral decline. Whether or not this is true, to

the extent that moral training requires religious foundations, the best solution is to look to religious communities and other nongovernmental sectors of our society for assistance, not to the public schools and other governmental institutions. This suggestion in no way means, of course, that public schools should not have a role in promoting morality, only that they not use religion as the basis for teaching moral behavior to students. Religion in America remains robust precisely because it remains independent of government support and regulation. In regions of the world where government is a religious advocate, where church and state are readily mixed, the people have lost to a considerable degree their desire to support their own religious institutions – because government does it for them. The result too often is the death of the voluntary spirit that sustains the dynamism and vibrancy of true religion, leading eventually to the demise of religion altogether. This process surely accounts for the decline of religion across much of Europe. Moral training must be a shared responsibility among all sectors of American society. The religious component of this moral training, including prayer exercises, must not be co-opted by governmental institutions under constitutional sanction. The result would be a confusion of roles, and further erosion of the founders' noble experiment in the separation of church and state.

B. Santa Fe's Prayer Practice as Civil Religion

In an attempt to salvage the practice of public prayer at events associated with the state – including public school activities – some argue that public prayer should

be permitted, and even encouraged, as a vestige of a civic or civil religion that undergirds the nation. The classic definition of civil religion in America is Robert Bellah's. Bellah contends that "certain common elements of religious orientation," shared by the great majority of Americans, "have played a crucial role in the development of American life, including the political sphere."[8] For Bellah, following Emile Durkheim,[9] the absence of a civil religion within any given society would lead to moral and spiritual decay among its people and, eventually, the decline or disappearance of the society altogether.

Bellah's account of civil religion presents the positive side of civil religion. But it has a negative, even ominous, side, too. The powerful symbols of civil religion are a constant temptation to political opportunists to exploit their emotional appeal for support of their favorite causes. Moreover, civil religion can become a form of idolatry, for it can become the object of ultimate loyalty in place of the God who is the true object of worship for most religious adherents.

Santa Fe ISD's policy on prayer at football games should not be upheld simply to perpetuate civil religion. Such a holding suffers the prospect of endorsing a policy whose political outcome becomes an idolatrous substitute for the worship of God. Moreover, such a holding would eviscerate much of the meaning of the First Amendment.

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[8] Robert Bellah, "Civil Religion in America," in *American Civil Religion*, eds. Russell E. Richey and Donald G. Jones (New York: Harper & Row, 1974), 24.

[9] Emile Durkheim, *The Elementary Forms of the Religious Life*, rev. ed. (New York: Free Press, 1965).

In *Weisman*, Justice Kennedy addressed the argument that commencement prayer should be countenanced as an expression of civil religion. He noted:

> There may be some support, as an empirical observation, to the statement . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. . . . If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.[10]

Kennedy's point here is that "civic religion," whatever its merits and however it might represent consensus, is religion just the same, and if promulgated by government, violates the Establishment Clause.

The sacred practice of religious expression through prayer must not be co-opted by the government as a means of preserving the secular purposes of civil religion. We already retain many prominent vestiges of civil religion: the motto, "In God We Trust," imprinted on our currency; the language "One Nation Under God,"

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[10] *Weisman*, 505 U.S. at 589. For an extensive treatment of the jurisprudential role of civil religion, see Derek H. Davis, "Civil Religion as a Judicial Doctrine," *Journal of Church and State* 40 (Winter 1998): 7-23.

included within our Pledge of Allegiance; the proclamation used to open judicial sessions – "God save the United States and this Honorable Court"; the annual declaration by our president of a National Day of Prayer. All of these symbols and activities, and more, are alive and well in American society. As Justice Brennan noted in his dissent in *Lynch*, these practices evidencing "ceremonial deism" are protected from Establishment Clause scrutiny "because they have lost through rote repetition any significant religious content. . . . The practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essential secular meaning." 465 U.S. at 716-17 (1984) (Brennan, J., dissenting). Public prayers offered at football games by high school students do not fall within this category – they cannot and should not be considered secular activity.

Those symbols and practices of civil religion which are embedded in our national life and which serve to affirm the religious dimension of our common existence take on a threatening, altogether dangerous, quality if used to mold, shape, or influence the religious sentiments of impressionable young people. It is one thing for this Court's crier to proclaim before an audience of mature adults, "God save the United States and this Honorable Court," but quite another for high school students, acting under state endorsement, to be given captive audiences of peers to "lead" in prayer. This Court should take extreme care in naming those fora where civil religion is formally to be embraced.

We need not and should not promote public prayer, particularly nonsectarian and nonproseltyzing orations, as a way to perpetuate civil religion. The activity of prayer, unique to a wide range of religious belief and practice, should remain an area which is free from state intrusion, and consequently, outside the sphere of state activity – whether that be the courtroom, the classroom, or the football field. And make no mistake – the Santa Fe ISD prayer policy constitutes state activity – "*government* speech," in Justice O'Connor's terminology. *Mergens* at 250. The act of permitting students to do by proxy what the school district itself cannot do hardly removes the school district's prayer practice from the ambit of state activity. As Justice Kennedy has concluded: "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference." *Weisman*, 505 U.S. 589.

C. The "Nonsectarian, Nonproselytizing" Requirement

If the school is permitted to direct adolescents in *how* to pray by insisting that the content of their public prayer be nonsectarian and nonproselytyzing, the state has invaded private conscience and religious belief at its very

core. School officials' involvement in monitoring the content of the pregame prayers will and must be viewed by the students not only as the school's participation in the process, but as direction and instruction in how to compose an "appropriate" prayer. We may assume that the students volunteering for or campaigning for the opportunity of offering the pregame prayer are persons for whom prayer is a meaningful and essential expression of religious beliefs. Surely one must concede that the Establishment Clause, if it protects anything, protects young persons from state instruction in how to compose the prayers they pray.

Any attempt by government to determine the content of prayer – even if done in a misguided attempt to ensure that students' public prayers are sufficiently innocuous as to be "non-offensive" to the audience – results in injury to believers as well as non-believers, religion as well as irreligion. Any prayer which the state deems secular enough to merely "solemnize" an event inevitably is a prayer which many devout religious believers will find so devoid of religious significance as to border on the sacreligious. For some Christians, prayer offered in anything other than Jesus' name is theologically wrong; for Jews, prayer in Christ's name is idolatrous. For Unitarians, prayer suggesting a trinitarian God is unacceptable. For most Buddhists, prayer presupposing a personal god is foreign. Any guidelines on how to craft a prayer which is religiously tolerant and broadly appealing to all citizens places the weight of government approval behind a form of prayer that is theologically neutered and without any true sacramental significance. By trying to

include everyone and offend no one, such prayers essentially exclude all meaningful religious expression. They are mere ritual, void of the sanctity that should characterize them.

Attempts to find a "happy medium" among the various claims of faith and non-faith, made necessary when prayer is deposited in the politically charged arena of the public school setting, not only are futile, but misguided as well. Only one conclusion is possible. Whatever form of prayer a government sanctions, even if only by establishing guidelines that prayer be nonsectarian or non-proselytizing, is government endorsement of a specific kind of prayer.[11] Such a government policy is neither neutral as between religion or irreligion, nor good for religion in America.

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[11] See generally Justice Brennan's dissent in *Marsh*, 463 U.S. at 819-21.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

MELISSA ROGERS
Baptist Joint Committee
On Public Affairs
200 Maryland Ave., N.E.,
Washington, D.C. 20002-5797
(202) 544-4226

DEREK H. DAVIS*
Baptist Joint Committee
On Public Affairs
J.M. Dawson Institute
of Church-State Studies
Baylor University
P.O. Box 97308
Waco, Texas 76798-7308
(254) 710-1510

**Counsel of Record*

Counsel for Amici

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IN THE

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SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

JANE DOE, individually and as next friend for her minor children Jane and John Doe, Minor Children; JANE DOE #2, individually and as next friend for her minor child, John Doe, Minor Child; and JOHN DOE, individually,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ANTI-DEFAMATION LEAGUE, COUNCIL ON RELIGIOUS FREEDOM, HADASSAH, INTERFAITH ALLIANCE, JEWISH COUNCIL FOR PUBLIC AFFAIRS, NATIONAL PEARL, PEOPLE FOR THE AMERICAN WAY FOUNDATION, SOKA GAKKAI INTERNATIONAL-USA, AND UNITARIAN UNIVERSALIST ASSOCIATION IN SUPPORT OF RESPONDENTS

WALTER E. DELLINGER
Counsel of Record
PAMELA A. HARRIS
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004-1109
(202) 383-5300

MARC D. STERN
AMERICAN JEWISH CONGRESS
15 East 84th Street
New York, NY 10028
(212) 360-1545

Counsel for Amici Curiae

Additional Counsel Listed on Inside Cover

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42

JEFFREY P. SINENSKY
KARA STEIN
AMERICAN JEWISH COMMITTEE
165 East 56th Street
Seventh Floor
New York, NY 10022
(212) 751-4000

STEVEN K. GREEN
AYESHA N. KHAN
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

STEPHEN W. ARENT
ELIZABETH J. COLEMAN
STEVEN M. FREEMAN
DAVID ROSENBERG
ANTI-DEFAMATION LEAGUE
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

NICHOLAS MILLER
COUNCIL ON RELIGIOUS FREEDOM
110 North Washington Street
Suite 404
Rockville, MD 20850
(301) 294-8766

TANA SENN
HADASSAH
50 West 58th Street
New York, NY 10019
(212) 303-8136

GUILA FRANKLIN SIEGEL
JEWISH COUNCIL FOR PUBLIC AFFAIRS
443 Park Avenue South
Eleventh Floor
New York, NY 10016
(212) 684-6950

DAVID B. ISBELL
MICHAEL L. ROSENTHAL
FAITH D. KASPARIAN
NATIONAL PEARL
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

ELLIOT M. MINCBERG
JUDITH E. SCHAEFFER
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 467-4999

EDWARD P. LEIBENSPERGER
UNITARIAN UNIVERSALIST ASSOCIATION
Nutter, McClennen & Fish
One International Place
Boston, MA 02110
(617) 439-2000

Additional Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

The *amici* joining in this brief are religious and secular organizations with a special interest in religious liberty. These *amici* offer special expertise in the area of prayer and religious activities in the public schools, and on the impact of this Court's rules on religious belief and practice more generally.

Amici, in agreement with both petitioner and respondent, urge the Court to reaffirm the important distinction between *private* religious expression, permitted and protected by the First Amendment, and *officially-sponsored* religious activity, prohibited by the Establishment Clause. That line has been crossed here, allowing for government-sponsored religious observances in the public school setting, to the detriment of religious believers as well as non-believers.

Because many *amici* have joined in a single brief, the interests of individual *amici* are stated more fully in an appendix. The *amici* joining in this brief are:

The American Jewish Congress, an organization of American Jews founded in 1918 to protect the civil, political, and religious rights of American Jews.

The American Jewish Committee, a national organization of approximately 100,000 members and supporters, founded in 1906 to protect the civil and religious rights of Jews and dedicated to the defense of religious rights and freedoms of all Americans.

Americans United for Separation of Church and State, a national public interest organization committed to preserving

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part, and no person or entity, other than the amici curiae, its members, and its counsel, has made a monetary contribution to the preparation and submission of this brief.

separation of church and state and religious liberty.

The Anti-Defamation League, organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States.

The Council on Religious Freedom, a non-partisan, non-profit national advocacy group that appears frequently in court on issues of religious freedom and the separation of church and state.

Hadassah, the Women's Zionist Organization of America, Inc., the largest women's and the largest Jewish membership organization in the United States, with over 300,000 members nationwide.

The Interfaith Alliance, a non-partisan, faith-based, national organization headed by clergy and lay people of faith with an active membership of over 100,000 religious people representing more than 50 faith traditions. The Interfaith Alliance is dedicated to promoting the positive role of religion as a healing and constructive force in public life.

The Jewish Council for Public Affairs, formerly the National Jewish Community Relations Advisory Council, an umbrella organization of 13 national and 122 local Jewish public affairs and community relations agencies across the United States.

People for the American Way Foundation, a nonpartisan citizens organization of over 300,000 members, established to promote and protect civil and constitutional rights, including First Amendment freedoms.

National PEARL, a diverse coalition of grassroots and national religious, educational, and civil organizations that seeks to preserve religious freedom and the separation of church and state in public education.

Soka Gakkai International-USA, a diverse American

Buddhist community with 300,000 members and 71 centers throughout the United States.

The Unitarian Universalist Association, a religious association of more than one thousand congregations in the United States, Canada, and elsewhere.

SUMMARY OF ARGUMENT

"[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion). This distinction underlies the Court's cases on prayer in the public schools – making room for private expressions of religious belief by students, on and off school grounds, but also assuring that the government itself neither influences nor sponsors student religious expression. *Amici* have long believed that the two principles behind this distinction are vital to protecting religious liberty; significantly, nearly all parties to this case have agreed upon them.

Distinguishing genuinely private from officially sponsored religious expression can give rise to close and difficult cases, particularly in the public school context. This is not such a case. Whatever the precise location of the line between private and official prayer in the public schools, prayer delivered under the Santa Fe Football Policy falls on the wrong side of that line – and by a wide margin.

First, the "invocation and/or message" is delivered as part of an official school-sponsored event, over which the school maintains near-total control. Instead of establishing a "forum" for student speech, the school district delegates to one student official responsibility for introducing the game, with an "invocation and/or message" that creates the "appropriate environment" for the school event to follow. JA 104. The school also provides that student with an audience, gath-

ered by the school for official purposes and required, for all practical purposes, to be present for the "invocation and/or message" as a condition of attending the entire school event. Under circumstances like these, the message of the student speaker is at least presumptively delivered on behalf of the school itself.

It may be possible, even in the context of an otherwise official school event, for a school to set aside a separate forum for the expression of purely private views, as to which the school itself remains strictly neutral. But this case does not raise that question, because the Santa Fe school district has not attempted to create such a forum. Unlike the fora at issue in the Court's "equal access" cases, the Football Policy does not allow for expression of a broad range of views and ideas, including religious views. Instead, it restricts student expression to a very few preferred messages – those consistent with the Policy's solemnity and sportsmanship goals – and then puts prayer, by terms, into that favored category. The expression "Winning isn't everything; winning is the only thing" is out of bounds, but prayer is in, and in expressly. The Policy does not put religious speech on an equal footing with secular speech, but favors religious speech over comparable secular speech. Because the school district has departed from neutrality, it is impossible to say that a student's decision to pray under the Policy is genuinely private, and not attributable at least in part to the government's expressed preference for prayer.

This is not the kind of help that religion wants or needs from government. Government-sponsored religious exercises hurt religious believers as well as non-believers. In communities sensitive to religious minorities, government involvement in religious activity leads inevitably to watered-down "nonsectarian" prayer, satisfying to few who take their religious commitments seriously. In other communities, official sectarian prayers track outright the beliefs of the dominant sect, excluding local religious minorities and making them outsiders in their own schools and towns. There is no good choice for government here, and no good role for government to play in the sponsorship of religious observances. The First Amendment spares the government this dilemma, by proscribing all forms of official prayer while preserving and protecting private prayer.

ARGUMENT

I. THIS COURT SHOULD REAFFIRM THE IMPORTANT DISTINCTION BETWEEN GOVERNMENT-SPONSORED RELIGIOUS ACTIVITY, PROHIBITED BY THE CONSTITUTION, AND PRIVATE RELIGIOUS ACTIVITY, CONSTITUTIONALLY PERMITTED AND PROTECTED.

"[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (plurality) (emphasis in original). This distinction lies at the heart of the Court's "equal access" cases, which both permit private religious speech by students and protect that speech against official school discrimination. *See Widmar v. Vincent*, 454 U.S. 263 (1981) (public university may not deny student religious group access to forum generally open to public); *Mergens*, 496 U.S. at 226 (applying same principle to public high schools under Equal Access Act); *Rosenberger v. Rector & Visitors of Univ.*, 515 U.S. 819 (1995) (public university may not deny student religious publication access to benefit available to wide variety of other student publications). This result is grounded in the broader principle that the government must be "a neutral in its relations with groups of religious believers and non-believers," *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947): when private religious speech is included in a forum gener-

ally opened to private secular speech, the "message is one of neutrality." *Mergens*, 496 U.S. at 248 (plurality).

These two principles – the prohibition of government-sponsored prayer and the protection of private prayer – work in tandem to safeguard religious liberty. Because the government may not itself sponsor religious exercises in the schools, it cannot coerce religious belief, even indirectly, or use its stamp of approval to make religion relevant to a person's standing in his community. *See Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in judgment). This assures that private religious beliefs are just that – private, "the product of free and voluntary choice by the faithful," *id.* at 53, rather than the result of government pressure or influence. And because the government may not discriminate against private religious expression, it cannot control or manipulate religious choices by suppressing religious messages with which it disagrees. Both these principles flow from the same constitutional conviction: that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992). Together, these principles protect private religious choice from government interference of any kind.

Amici are thus in agreement with both petitioner and respondent that the Court should reaffirm the distinction between religious expression that is government-sponsored and thus prohibited, on the one hand, and religious expression that is purely private and thus protected, on the other. Like the school district, we believe that this case turns on "the distinction between direct government involvement in religious speech and government toleration of [private] religious expression." Pet. Br. at 19. A school policy that is neutral as to religion and produces religious speech only as a result of intervening and purely private decisions, Pet. Br. at 18, raises questions very different from those presented by this case.

While petitioner treats these two conditions – neutrality and independent private choice – as distinct, we think that they are related, for the reasons discussed just above: only if the government is neutral toward religion can a person's decision to engage in religious activity be deemed purely private, unaffected by government influence. Nonetheless, we are in basic agreement with the school district (and most of its *amici*) on the legal standard that governs this case, and our differences as to application should not overshadow the importance of this consensus.

II. THIS CASE FALLS ON THE WRONG SIDE OF THE LINE BETWEEN GOVERNMENT-SPONSORED AND PRIVATE PRAYER.

The school district seems at times to suggest that whether speech is governmental or private for Establishment Clause purposes turns simply on the identity of the speaker. *See, e.g.*, Pet. Br. at 19 ("Speech that is student-led and student-initiated results from the individual speaker's choices."). But that cannot be right. In the years prior to adoption of the Football Policy, Santa Fe High School gave the student council "chaplain" exclusive access to the public address system at home football games for the sole purpose of delivering a prayer. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 810 & n.4 (5th Cir. 1999). This speaker was a student, and apparently decided for him or herself the precise content of the invocation. Nevertheless, we think it is clear – and nobody in this case appears to contest – that the student council chaplain spoke at football games *on behalf of the school*, so that his or her speech was subject to Establishment Clause constraints. The point here is simple but critical. Even private parties can speak for the government, *see Rosenberger*, 515 U.S. at 833-34 (when it "enlists private entities to convey its own message" government may regulate views expressed), or under circumstances that make their speech attributable to the government, *see County of Alle-*

gheny v. ACLU, 492 U.S. 573, 599-600 (1989) (attributing privately erected display in county courthouse to government). Labeling speech "student-led" or "student-initiated" does not by itself resolve the question of whether speech is government-sponsored or purely private.

More careful inquiry makes clear that any speech uttered under the Football Policy is government-sponsored so as to implicate the Establishment Clause. The student speech is an integral part of an official school event, with the selected student playing the role delegated to him or her by the school. *Amici* doubt that speech delivered as part of a school-sponsored official event like this one can ever be truly private for Establishment Clause purposes. But even if it can be, it is not here. The Football Policy is not neutral toward religion; on the contrary, it encourages and favors prayer. Any prayer that results under this policy is therefore attributable in significant part to the government and is not simply the result of private decision-making.

A. Speech Delivered as Part of Official School Functions Like Santa Fe Football Games Is Presumptively Attributable to the Government.

The school district and its *amici* picture a robust and freewheeling forum in which students, operating free of any significant school control and apart from any officially-convened audience, will air a wide range of private views. Under circumstances like those, as the Court held in *Mergens*, any speech delivered is likely to be attributable only to the individual speaker. 496 U.S. at 248-52. But this case is nothing like that. The student speech here occurs as part of an official school event over which school officials maintain full control. *Compare id.* at 251 (relying on absence of any official participation in student meetings under Equal Access Act). Students who are not interested in hearing the speech in question must nevertheless be in the audience as a condi-

tion of participating in the official school function. *Compare id.* at 251 (relying on absence of captive audience problem). And the school restricts entry to the so-called "forum" as well as the content of the message that may be delivered, so that there will be no "broad spectrum" of views represented. *Compare id.* at 252 (relying on open access and broad array of student groups). This case is not *Mergens*, and at an official function like school-sponsored football games the message of the single student permitted to speak is at least presumptively attributable to the school.

1. Santa Fe football games, like all high school football games, are directed and controlled by school officials. School officials decide who will participate in the games, and then oversee the activities of these football players, cheerleaders, band members, and other students. School officials schedule games and control the facilities in which they are played. Most directly relevant here, school officials direct the timing and content of activities at the games themselves, from pregame ceremony to half-time show to any postgame event. The Football Policy itself makes clear that Santa Fe is no exception to this general rule: a student "invocation and/or message" may be given during the pregame ceremonies only because the "board has chosen to permit" one. JA 104.

The control that Santa Fe officials maintain over football games as a whole extends to the "invocation and/or message" itself. School officials made the initial determination that a *single* student speaker, selected *once* a year to serve for the *entire* year, would be permitted to open Santa Fe football games with an "invocation and/or message." Although students elect the speaker, the election process is designed, authorized, and directed by the school. The school then implements and enforces the election outcome by giving the preferred speaker, and no other student, access to the public address system. School officials control the timing

and duration of the "brief" student speech. Finally, though the student speaker maintains some discretion over his or her "invocation and/or message," its basic content is prescribed by the school: the speaker is to introduce the official event to follow, by establishing the "appropriate environment" for the game. JA 104.

Very similar indicia of school control led this Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 267-73 (1988), to conclude that a student newspaper was not a forum for private speech, but instead a school-sponsored expressive activity. Though the student-journalists exercised some authority over the content of their speech, *id.* at 269-70, the school maintained significant control by, *inter alia*, selecting the editors of the paper, scheduling publication dates, and planning the layout of each issue. *Id.* at 268. As a result, student speech in this context was not "personal expression that happens to occur on school premises," *id.* at 570, protected against content-regulation by the First Amendment. Rather, it was a "part of the school curriculum," fully subject to the school's editorial discretion. *Id.* at 271; *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (student speech at school assembly subject to school editorial control). The same principle applies here. When student speech occurs as part of activities that are as heavily regulated by the school as are the Santa Fe football games, the student speech is at least presumptively sponsored by the school itself.

2. By linking the speech in question to football games, Santa Fe officials gather an audience for the speech. For many students, attendance at football games, including the pregame ceremonies, is mandatory in the literal sense: cheerleaders and band members, as well as football players, are required to attend. JA 65. But school officials also have created a kind of "tie-in" for the benefit of the selected speaker: *all* Santa Fe students who wish to participate fully

in the school event, including the pregame festivities, must also sit through the student speech. The effect is that the only way to avoid the student message is to forgo the benefit of being a full participant in the high-school football game experience. And as petitioner's own *amici* emphasize, this benefit is important enough that few, if any, students could be expected to go without it: football games are "major community-wide social event[s]," serving as a "community bond" and the "very embodiment of a community's civic pride." Brief of *Amicus Curiae* Texas Association of School Boards Legal Assistance Fund at 5-7. In other words, students absent themselves only at the expense of putting themselves outside their own communities. *See also Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 831 (11th Cir. 1989) (discussing "powerful incentive" for students to attend football games). By tying the speech to so valuable a benefit, officials produce what is effectively a captive audience for the student message. *See Lee v. Weisman*, 505 U.S. 577, 586, 595 (1992) (graduation is mandatory in "fair and real" sense because students cannot avoid it except by "forfeiture" of "intangible benefits").

Our primary point here is a descriptive one. The government is most unlikely to gather a captive audience – and especially an audience of school children – for speech that it does not control and of which it does not approve. It is hard to imagine, for instance, a school turning an official sporting event with a stadium full of students into a true open forum like the one in *Mergens*, 496 U.S. at 251-52, complete with controversial "religious, political [and] philosophical" views aired by speakers over whom the school could exert no content-based editorial control. Indeed, it is in part because speech delivered to captive audiences of school children is so likely to be associated with the school itself that schools enjoy the legal authority to regulate that speech. *See Hazelwood*, 484 U.S. at 266-67, 271-73; *Fraser*, 478 U.S. at 685-86. When the government gathers a captive audience of

school children for speech, then, it is fair to presume that the government sponsors that speech.

The captive audience at Santa Fe football games is relevant in a second respect: it raises the stakes on the inquiry by introducing the potential for government coercion of religious activity. When student religious speech occurs in settings that are separate from any other school activity – when, for instance, a student religious group meets after school on school premises – then students who wish to avoid the religious activity may easily do so, and there is "little if any risk" of official coercion. *Mergens*, 496 U.S. at 251. But when, as here, student religious speech is tied to some other important activity so that attendance is either actually or effectively mandatory, then the stage is set for coerced participation in a religious exercise. *See Lee*, 505 U.S. at 592-94 (discussing "subtle coercive pressure" that results when audience of students made captive to religious activity). In cases like this, the Court must carefully police the line between purely private and government-sponsored religious activity. Unless the government maintains the most scrupulous neutrality toward religion in these settings, the end result will be official coercion of religious activity.

Indeed, petitioner's theory of this case would allow for student-delivered prayers not only at football games and graduation, but also at student council meetings, choir practices, and before drama club productions. Moreover, it would extend even into the classroom, where the presence of dissenting students is literally compelled by the state. There is no reason, under the school board's argument, why Santa Fe could not add to its graduation and football policies a "Classroom Speech Policy," delegating to one elected student – with the approval of a majority of the student body – the authority to open each school day with an "invocation and/or message" delivered over the school public address system. *Cf. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d

274, 277-78 (5th Cir. 1996) (state School Prayer Statute allowing for "student-initiated" prayer at "compulsory or non-compulsory" school events violates Establishment Clause except as applied to graduation); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (state statute allowing for classroom prayer led by student volunteers violates Establishment Clause). Labeling "private" what is in fact government-sponsored religious expression reopens the door to official classroom prayer exercises and the resulting coercion of religious activity. *See Engel v. Vitale*, 370 U.S. 421, 430-431 (1962) (official classroom prayer recitations violate Establishment Clause in part because of coercive effect).

3. Santa Fe football games historically have been a forum for official *government* speech. Until adoption of the Football Policy in 1995, time at the beginning of football games was reserved for the government's own speech, in the form of an invocation delivered over the public address system by the student council "chaplain." *See infra* p. 7. The fact that the school has in the past reserved this same time during pregame ceremonies for its own speech supports the presumption that the student who now speaks during that time is exercising – and will be perceived as exercising – official authority delegated to him or her by the school.[2]

This factor distinguishes this case from that of a valedictorian's address at a school graduation. *Cf. Doe v. Madison School Dist.*, 147 F.3d 832 (9th Cir. 1998) (upholding policy permitting students chosen on academic grounds to deliver "any . . . pronouncement," including "prayer," at graduation), *vacated as moot*, 177 F.3d 789 (1999). In at least some school districts, there is a long history of valedictorians who speak in an entirely personal capacity at graduation – a

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[2] The reasonable perceptions of government approval of religion that will result from the Football Policy are discussed in Part II.C., *supra*.

tradition, that is, of isolating a distinct and robust forum for genuinely private speech in the midst of what is otherwise an official event. But here the history is precisely the opposite, and only heightens the presumption that the student speech is attributable to the government.

* * * *

The result in this case would be obvious if the Football Policy designated the school principal, rather than a student, to deliver the "invocation and/or message" before football games. Even if the principal were directed to choose the content of his message for himself, we think it would be clear that he spoke in an official and not a private capacity. But what would make it clear is precisely the same context that obtains here: that the speech is part of an official school activity over which the school maintains full control, for which the school gathers an audience, and during which the school has previously communicated its official views. Together, these factors create a powerful presumption that any speech – even student speech – delivered as part of this official school event is attributable to the school itself. This is not a technical legal point about burden-shifting so much as a common-sense evaluation of the way things usually are – and usually, student speech that is delivered as part of an official school activity like Santa Fe football games is part of the school's own program.

B. The Presumption of Government Attribution Is Not Overcome in This Case.

Amici doubt that the presumption of official sponsorship just described could ever be overcome with respect to speech delivered as part of Santa Fe football games, given the degree of control exercised by the school over the entire event and the problems raised by the presence of a captive audience. But *amici* are certain that the presumption has not been overcome here. This is not a case in which a school has

opened a neutral and open forum in an otherwise official context, raising questions about whether a student speaker's decision to pray might be thought of as genuinely independent and private. *Cf. Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (government funding reaches religious institutions "only as a result of the genuinely independent and private choices of aid recipients"). Even if there are circumstances under which the private choice of a student speaker could act as a "circuit-breaker," severing the presumed connection between the official event, on the one hand, and the student prayer, on the other, *see Rosenberger*, 515 U.S. at 886 (Souter, J., dissenting), they are not present here.[3] The Football Policy is not neutral toward religion, but instead skews the "forum" in the direction of prayer. For this reason alone, a student's decision to pray cannot be deemed purely private, and there is no genuinely "independent discretion" to break the link between the official school event and the speech delivered.

1. Of the universe of possible messages that could be delivered before a football game, the Football Policy singles out "invocation," and only invocation, as expressly approved. This is not neutral as to religion. If a school district wants to create an open forum at the start of football games for student speech, including, at the speaker's option, religious speech, the neutral way to do so is with a policy that simply provides for delivery of a "message" to be chosen by the speaker. A school district might even attempt an exhaustive list of the types of speech available to the student

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[3] We do not count the student referendum in this case among the circumstances that might help to distance the government from the ultimate message delivered. On the legal insignificance of the election, we are in substantial agreement with the position set out in respondent's brief. If, as here, a minority of the student body has a valid constitutional objection to being subjected to prayer while effectively captive in the audience, then that objection is surely no more subject to override by vote of the majority than would be any other constitutional entitlement.

speaker. *See Doe v. Madison*, 147 F.3d at 834 (upholding graduation policy allowing valedictorian to deliver "'an address, poem, reading, song, musical presentation, prayer, or any other pronouncement'"). But specific designation of prayer and prayer alone in the Football Policy gratuitously singles out religious expression for special approval, and crosses the line between government neutrality and government favoritism. This was the principle behind *Wallace v. Jaffree*, 472 U.S. 38, 60-61 (1985), in which the Court invalidated an Alabama statute that authorized a moment of silence during the school day for "meditation or voluntary prayer" reasoning that inclusion of "voluntary prayer" reflected an intent to "characterize prayer as a favored practice." *See also* Walter Dellinger, *The Sound of Silence: An Epistle on Prayer and the Constitution*, 95 Yale L. J. 1631, 1636 (1986) (discussing *Jaffree* and questioning whether hypothetical statute providing for moment of silence for "meditation or erotic fantasy" could be deemed truly "neutral" as to erotic fantasy). The same principle governs this case, as well.

The school district's only response to *Jaffree* is to emphasize that the Alabama statute at issue there effectively added the words "or voluntary prayer" to an existing statute already providing for a moment of silence for "meditation." 472 U.S. at 59. Here, by contrast, the preexisting practice was one that permitted prayer and only prayer at Santa Fe football games, *see infra* p. 13, so that what the Football Policy – at least, the second version of the Football Policy – added in 1995 was not the "invocation" but the option of a secular "message." Pet. Br. at 26-28.[4] This is irrelevant. Nobody in this case is arguing that the district's decision to

[4] The school district's first version of the football policy, adopted in August 1995, added nothing at all, permitting only student-approved and delivered "invocations" at football games. *See* "Prayer at Football Games," JA 99-101.

include "and/or message" in the 1995 Football Policy itself violated the Establishment Clause. The dispute here is over the Football Policy as promulgated, in its entirety. And whether "invocation" comes first or is added second, the effect is the same, and the same as in *Jaffree*: prayer is characterized as a favored activity.[5]

Relying on the dissenting opinions in *Jaffree*, some of petitioner's *amici* suggest that express reference to "invocation" in the Football Policy is necessary because students might otherwise believe that religious speech before football games is forbidden. *See* Brief of *Amici Curiae* Congressman Steve Largent and Congressman J.C. Watts at 23-25. This contention, of course, was rejected by the Court in *Jaffree* itself. In any case, there seems never to have been much doubt about the permissibility of prayer at football games under the school district's policies – which, as petitioner itself emphasizes, allowed for prayer and only prayer until adoption of the second Football Policy in October 1995. And prayer, of course, remains the sole form of student speech permitted under Santa Fe's graduation policy, which calls for student-delivered "invocations and benedictions for the purpose of solemnizing" graduation ceremonies. Pet. App. at G-1. No student "mature enough" to understand the distinction between private and governmental speech, *see Mergens*, 496 U.S. at 250, will labor under the misimpression that religious speech has been eliminated "wholesale" from the Santa Fe schools, *see* Brief for Largent & Watts at 24.

[5] In a footnote, petitioner also quotes a sentence from Justice O'Connor's concurring opinion in *Jaffree*, recognizing that inclusion of the word "prayer" in a moment of silence statute will not in all cases "encourage[] prayer over other specified alternatives." Pet. Br. at 26 n.10. But use of the word "prayer" was, for Justice O'Connor, important evidence that the Alabama statute had the purpose and effect of endorsing prayer as an approved activity. 472 U.S. at 76-79 (O'Connor, J., concurring in the judgment).

2. A more fundamental problem with the Football Policy is that it does not allow for a broad range of speech by students, creating an open forum that naturally encompasses religious as well as secular speech. *Compare Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (university forum "generally open" to wide spectrum of student speech); *Mergens*, 496 U.S. at 252 (same in high school); *Rosenberger*, 515 U.S. at 824 (funding for wide array of student journals); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 758-59 (1995) (state-owned plaza open to all speakers without regard to speech content). Instead, the Policy designates a very narrow range of messages that may be delivered by the student speaker, and then puts prayer into that specially approved category. This is not government neutrality toward religion.

The Football Policy allows for delivery of those "invocation[s] and/or message[s]" that are "consistent with the goals and purposes" of the Policy. Those goals and purposes, in turn, are to "solemnize the event" and "to promote good sportsmanship and student safety." (The Policy also refers to establishing an "appropriate" environment for the football game, which appears to be an allusion to the two purposes expressly listed: solemnization and promotion of good sportsmanship.) On its face, then, the Policy permits the following types of speech and only these types of speech: invocations (at least, those invocations that are suitably solemn and sportsmanlike), messages that solemnize the event, and messages that promote good sportsmanship.[6]

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[6] The fact that the school district has disclaimed authority to pre-approve student speeches, Pet. Br. at 11, does not, of course, negate the Policy's limits on student speech. Speech can be restricted by *post hoc* enforcement of limits as well as by prior restraints, and the school district has not disavowed imposition of penalties after the fact for unapproved speech. This point is obvious, but also very important to *amici*. Imagine, for instance, that a school with an Equal Access Act forum were to promulgate a policy that by terms excluded religious speech from the

A policy as restricted as this one does not put religious speech on an equal footing with comparable secular speech, giving religious speech no more than "the same access to a public forum that all other [speech] enjoy[s]." *See Pinette*, 515 U.S. at 763-64 (opinion of Scalia, J.). This Court's cases involving religious speech in open fora always have assumed that what is comparable to religious speech for purposes of an "equal access" analysis is ideological or political speech, or other speech that is likely to be controversial. *See Mergens*, 496 U.S. at 252 (access under Equal Access Act extends to "a Jewish students' club, a Young Democrats club, or a philosophy club devoted to the study of Nietzsche"); *Pinette*, 515 U.S. at 757-58 (square open for "free discussion of public questions" and used previously by "[s]uch diverse groups as homosexual rights organizations, the Ku Klux Klan, and the United Way"); *Rosenberger*, 515 U.S. at 841 (withdrawals from activity fund permitted "to cover the whole spectrum of speech, whether it manifests a religious view, an antireligious view, or neither"). The Football Policy, on the other hand, explicitly authorizes the expression of religious viewpoints through "invocations," but does not allow for expression of any other kind of ideological or political view. A student wishing to deliver a secular message is limited to one that solemnizes the event or promotes good sportsmanship – leaving no room for, say, a speech endorsing a candidate for political office or even urging students to vote, much less the "antireligious" speech conjured up by one of petitioner's *amici*. *See* Brief for *Amicus Curiae* Christian Legal Society at 28 (erroneously suggesting that Policy allows for expression of "whole spectrum" of student views, including "antireligious" views).

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forum. Surely the school could not save that policy, which on its face violates the Act, simply by refraining from pre-approving student group activities.

The case of the school valedictorian who may speak on any topic she chooses is distinguishable on this ground, as well. When a valedictorian or other graduation speaker may use her time to criticize United States involvement overseas, or to endorse single parenthood, or to deliver any number of ideological and controversial messages, then religious expression by the same speaker falls more neatly under the case law described just above and may be, in the words of Justice Souter's oft-quoted footnote in *Lee*, "harder to attribute" to the government. 505 U.S. at 630 n.8 (Souter, J., concurring). *See Doe v. Madison*, 147 F.3d at 834-35 (upholding graduation policy that allows valedictorian unrestrained discretion to express any view, including religious views). But this is a much easier case than that one. Here, religious views are permitted in a "forum" that allows for no other ideological or political views, creating an effect that is not neutral but partial to religion.

It might be argued that the school can, in this context, favor religious speech over political and ideological speech because an "invocation" is related to the subject at hand – a football game – in a way that a political or ideological speech is not. What is comparable to religious speech in this setting, the argument would be, is secular speech on the subject of football. But even assuming, *arguendo*, that "comparable" speech could be defined so narrowly, it would still be the case that the Football Policy favors religious speech over comparable secular speech. The subject of an imminent high school football game allows, in theory, for a variety of perspectives or messages: that a football game is a raucous occasion for fun, for instance, or that "winning isn't everything, it's the only thing," or that the other team is inadequate in some way that strikes high school students as humorous. But none of these messages is permitted under the Policy. Even within the category of game-related speech, the Policy singles out a very few preferred approaches and messages, including prayer, and excludes all the rest.

For that reason, the school district's insistence that the Football Policy does not favor "invocations" over "messages," Pet. Br. at 18, even if it were true (*but see* discussion in Part I.B.1, *infra*), would be beside the point. Petitioner has made a simple category mistake. The problem we identify here is not that the Policy favors prayer over the limited range of secular speech it permits. The problem is that the Policy favors prayer over all of the secular speech it does *not* permit: the wide range of political, ideological, and other speech that is precluded by a Policy limiting the ideas to be expressed to those that promote solemnity and sportsmanship. It is as though the vocational education program at issue in *Witters*, instead of funding training in "professions, business or trades" generally, 474 U.S. at 483, funded only training at divinity and law schools. On the school district's account, the program remains neutral: religious and secular training are both available, with the choice left to the aid recipient. Pet. Br. at 18. But the program is not neutral as between religion and all of the professional and business educations excluded, and it is this more substantive kind of neutrality that the Court demanded in *Witters* as a condition of upholding aid to religious education. 474 U.S. at 488.

Petitioner may attempt to avoid the conclusion that the Football Policy favors religious speech by arguing that the category of comparable secular speech in this case is not political or ideological speech, nor even all football-related speech, but only secular speech that solemnizes football games and promotes good sportsmanship. The forum created by the Policy, the argument would go, is limited to promotion of solemnity and sportsmanship, and the Policy includes all secular speech, as well as religious speech, that falls within forum boundaries. But as this Court explained in *Rosenberger*, a government program for transmitting so narrow and specific a message – "This football game is a solemn event, for which good sportsmanship is appropriate" – is not a forum for private speech at all. 515 U.S. at 833-35.

Instead, it is a vehicle by which the government enlists private parties, like the doctors in *Rust v. Sullivan*, 500 U.S. 173 (1991), to speak *for the government*, "convey[ing] a governmental message" rather than their own views. *Rosenberger*, 515 U.S. at 833. On this understanding of the Football Policy, student speakers communicate the school's "own favored message," subject to the school's editorial control, *id.* at 834, but also to Establishment Clause constraints. And under those constraints, the message cannot be a prayer.

This may in fact be the proper way to categorize student speech delivered under the Football Policy. That Policy certainly appears to reflect a "particular policy of [the school district's] own," *id.* at 833, about how football games are to be understood and played. The most recent Santa Fe football policy, adopted in 1999, confirms that the school district has in mind a very specific message for the student speaker: layered on top of the original Football Policy is the advice that the speaker may

> welcome or greet the fans and the opposing team and/or commend them for their achievements. Consistent with the educational mission of the [school district], the pre-game message should be respectful, encouraging, and positive. The entirety of the speaker's message should serve these goals.

Brief for *Amicus Curiae* Marian Ward, App. D. Those are perfectly laudable government goals, of course, but there can be no mistaking the fact that they are the *government's*, and that the speaker is not free to give a message that does not serve them. And treating student speech under the Policy as "governmental" explains why it is that the Policy may prefer some viewpoints (sportsmanship is more important than victory) over others (victory is more important than sportsmanship): although the government may never discriminate based on viewpoint when it regulates *private* speech, when the government enlists private parties to convey its *own* message it is as though the government itself is speaking, and it is then "entitled to say what it wishes." *Rosenberger*, 515 U.S. at 833; *see also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (when government speaks through third parties, content generally left to government's editorial discretion).

But whether or not a student "invocation and/or message" delivered under the Football Policy is "governmental" in the sense described in *Rosenberger*, the government has "spoken" here already, through an official Football Policy that, as we have shown, favors religious expression. Instead of neutrality toward religion, the Policy reflects a preference for prayer over comparable secular speech. That is enough by itself to violate the Establishment Clause. *See Wallace*, 472 U.S. at 60; *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989).[7] The preference for prayer also makes it impossible to say that prayers delivered under the Policy result solely from "the genuinely independent and private choices" of students, and are not attributable at least in part to the government's influence. This case, then, does not raise the question of whether entirely private decision-making might break the presumptive link between an official school event and a prayer delivered as a part of that event.

C. The Football Policy Creates an Impression of Governmental Endorsement of Religion That Is In Fact Accurate.

In light of both the official nature of Santa Fe football games, described in Part I.A. of this brief, and the preferred status that the Football Policy affords to religious speech,

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[7] This would be so even if no student ever delivered a prayer under the Policy: the government may not favor or encourage religion on the condition that its efforts yield no direct success. Petitioner's reliance on the facial status of the challenge to the Football Policy, *see* Pet. Br. at 16-17, is unavailing on this ground alone.

discussed in Part I.B., reasonable observers will attribute to the government approval of any student prayer that is delivered under the Policy. And because the Football Policy does indeed favor prayer over comparable secular speech, that attribution will be correct. The Football Policy, in other words, creates an "impression of endorsement that *is in fact accurate*." *Pinette*, 515 U.S. at 766 (plurality) (emphasis in original). Under any understanding of the endorsement standard relied on by this Court, *compare Pinette*, 515 U.S. at 764, 766 (plurality) (endorsement standard implicated when government actually favors religion) *with id.* at 774 (O'Connor, J., concurring) (endorsement standard may be implicated where "private religious conduct has intersected with a neutral governmental policy"), this constitutes governmental endorsement of religion that is forbidden by the Establishment Clause.

Nor can a disclaimer, a possibility raised by some of petitioner's *amici*, cure this problem. Disclaimers may be important in ambiguous cases that involve incorrect perceptions that the government has approved or favored religion. In such cases, disclaimers may help to clarify that private religious expression is not in fact attributable to the government. *See Pinette*, 515 U.S. at 782 (O'Connor, J., concurring); *id.* at 793-94 n.1 (Souter, J., concurring); *Rosenberger*, 515 U.S. at 823, 841; *Mergens*, 496 U.S. at 270 (Marshall, J., concurring in judgment); *see also* Brief of Christian Legal Society at 15-16 (disclaimer as remedy when private religious speech misattributed to state). But when the government has in fact favored private religious expression, so that the private expression actually is attributable to the government, then disclaimers are beside the point: this Court never has suggested that the government may favor religion so long as it simultaneously denies that that is what it is doing. *County of Allegheny* is a good example. Having granted preferential access to the County Courthouse for a creche displayed by private parties – a creche that was, in fact, accompanied by a disclaimer identifying the private nature of the display – the government could not avoid an Establishment Clause violation simply by "disclaiming" a preference for religion, and the Court never suggested otherwise. 492 U.S. at 600-01. For the same reason, the school cannot "disclaim" approval of religious expression here.

Because this case involves an "accurate" impression of endorsement, the Court need not inquire into whether there might be a reasonable *misperception* that the government has favored private religious speech, or what role a disclaimer might play in that event. But we note that even if the school district had adopted a neutral version of the Football Policy, the indicia of endorsement would be even stronger here than in *Pinette*, in which five Justices concluded that a privately-displayed cross in a neutral open forum impermissibly endorsed religion, at least absent an adequate disclaimer. *See* 515 U.S. at 776 (O'Connor, Souter, & Breyer, JJ., concurring in part and concurring in judgment) (disclaimer prevents Establishment Clause violation); *id.* at 806-07 (Stevens, J., dissenting) (Establishment Clause violation); *id.* at 817-18 (Ginsburg, J., dissenting) (same). What indicated government approval in *Pinette* was that the cross stood in front of a statehouse, in "close proximity" to official government buildings. *Id.* at 776 (O'Connor, J.). Here, of course, the "invocation and/or message" is delivered as part of an official government event, and enjoys the same "place of prominence" with respect to official activity that concerned the Court in *Pinette*. *Id.* at 785 (Souter, J.). But in *Pinette*, at least, the forum was open to all comers, and had been used in the past by groups as diverse as "homosexual rights organizations, the Ku Klux Klan, and the United Way," *id.* at 758, counteracting the message of endorsement, *id.* at 782 (O'Connor, J.,); *see also Mergens*, 496 U.S. at 252 ("broad spectrum" of officially recognized groups counteracts message of endorsement). Here, by contrast, access to the "forum" is so selective, and the message delivered so tightly

controlled, that there will be no broad range of groups or views represented. Instead, it becomes significantly more likely that the "forum" will be dominated by religious speech, raising special endorsement concerns. *Pinette*, 515 U.S. at 777 (O'Connor, J.); *see also Widmar v. Vincent*, 454 U.S. 263, 275 (1981) (relying on "absence of empirical evidence that religious groups will dominate" forum to uphold equal access policy).

Finally, and perhaps most important, there is "the history and context of the community and forum" in which the religious expression occurs. *Pinette*, 515 U.S. at 780 (O'Connor, J.) The reasonable observer here will know that until 1995, time at the start of each Santa Fe home football game was reserved exclusively for *government-sponsored* prayer, delivered by *a student*. *Id.* at 781 (reasonable observer will know "how the public space in question has been used in the past"). Standing alone, that would be enough to support a very reasonable inference that when a student delivers a prayer at the start of a Santa Fe football game today, he or she is following in the same tradition. But "an informed member of the community," *id.* – and certainly all members of the student community – will also know of the school district's *graduation* policy, which officially sanctions student-delivered "invocations and benedictions" only. The same well-informed community member may also know that the school district's initial version of the Football Policy, JA 99-101, would have mirrored the graduation policy, allowing only for student-delivered invocations, *see Wallace*, 472 U.S. at 77 (O'Connor, J.) (relying on legislative history in endorsement analysis) – in defiance of governing Fifth Circuit law. *See Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (limiting prayer by student referendum to graduation and holding such prayer impermissible at athletic events). This would surely be a case of the sort that Justice Souter had in mind in *Pinette*, in which the "indicia of endorsement," taken together, are so strong that they

would "outweigh the mitigating effect of [any] disclaimer." 515 U.S. at 794 n.2. When resistance to the School Prayer Cases and to *Lee* is as manifest as this, it is apparent to the reasonable observer, and the message the government sends is that nothing will interfere with its support of prayer. Against this background, it is perhaps not surprising that this case, as we have shown, involves *actual* and not merely *perceived* favoritism toward religion, making it an easy one under any of the standards suggested in *Pinette*.

III. GOVERNMENT-SPONSORED RELIGIOUS EXERCISES HURT RELIGIOUS BELIEVERS AS WELL AS NON-BELIEVERS.

The constitutional prohibition on government-sponsored religious observances serves several ends. It protects the government itself from debilitating power struggles, as religious groups compete for control over official prayers. *See Lee*, 505 US. at 607 (Blackmun, J., concurring). It protects the freedom of conscience of non-believers against government coercion. *Id.* at 605-06. But *amici* would like to emphasize that the prohibition on government-sponsored religious exercises also protects religious believers themselves.

When the government sponsors prayers, it has two basic options. In an effort to be sensitive to minority interests, the government can prescribe a particular form of prayer, one that deletes indicia of any particular faith and leaves only references to an anonymous deity. This, of course, is the approach taken by the Fifth Circuit in the case below, requiring that student prayers delivered at graduation be "nonsectarian" and "nonproselytizing." 168 F.3d at 822. The second option is the preferred approach of the Santa Fe school district: the government can sponsor manifestly sectarian prayer and unrestrained proselytizing. Both these governmental choices are bad, and both are bad for religious believers.

When the government censors public prayers, stripping them of sectarian references, the only thing left is a kind of least-common-denominator ecumenism, prayers designed to appeal to the largest possible audience. The government's efforts can never be entirely successful: even watered-down prayer to an unnamed deity is a particular form of prayer, and in this sense, the term "nonsectarian prayer" is an oxymoron. But by removing from religious observance those things on which different faiths are most likely to disagree, the government is left with an abstract and impersonal God that nearly all faiths reject. The result is unacceptable to many believers who take their own faiths seriously.

Moreover, the attempt to be inclusive – well-intended as it is – may actually amplify the message of exclusion to those left out. Because such prayers are carefully orchestrated not to offend anyone who counts in the community, the message to those who are offended is that they do *not* count – that they are not important enough to avoid offending. Again, it is not only non-believers who will be excluded or offended by prayers in these cases. "Nonsectarian" prayers also exclude serious particularistic believers, those who take their own form of prayer seriously enough that they do not want to participate in somebody else's. Believers who would not pray at all before a football game, those who would pray only in private, those who would pray only to Jesus, or Mary, or some other intermediary, those who would pray in Hebrew, or Arabic, or some other sacred tongue, all would be excluded or offended by a nonsectarian prayer delivered under the Football Policy.

We are of course sympathetic to the good-faith concerns that prompt government officials, like the Fifth Circuit here, to choose nonsectarian prayers for official public events. But as the experience in the Fifth Circuit suggests, this approach itself raises significant issues. Already legal disputes have arisen over the precise boundaries of "nonsectarian"

prayer, 168 F.3d at 822 (district court erred by defining "nonsectarian" too broadly), and more can be expected to follow, *see Lee*, 505 U.S. at 616-17 (Souter, J., concurring) (discussing fine line between sectarian and nonsectarian prayer). Adhering to this ill-defined limit is difficult enough when the government itself is leading the prayer. But when, as in this case, the government sponsors the prayer of a private party, a "nonsectarian" restriction almost inevitably turns the government into a censor of prayer, charged with assuring that prayers composed by religious believers conform to the government's view of what is sufficiently enlightened and tolerant. Any program of government-supported prayers that leads to such a result is profoundly adverse to the interests of religious believers.

But the government's other option – sponsorship of sectarian prayer and proselytizing – is also unattractive. In most communities, sect-specific prayers at official events will reflect the beliefs of the religious majority. This case is a good example: selection of speakers by majority vote under the Football Policy virtually assures that the prayers delivered will be those of the dominant religious group. Local religious minorities will be systematically excluded by officially-sponsored sect-specific prayers.

That sense of exclusion is likely to be deeply felt. "[A] prayer which uses ideas or images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral." *Lee*, 505 U.S. at 588. When the government sponsors sectarian prayer, it deliberately forgoes any effort to be inclusive, and the message to religious minorities could not be plainer: You are not important enough to this community for us even to go through the motions of trying to make you feel included. And when the government, as the school district would like to do here, disclaims any limits on the prayers it sponsors, it must expect more in the way of sectarianism

than a reference to Jesus. Millions of Americans believe that all religions are not equal, and that theirs is better, or even the one true faith. When that is the message of prayers that are officially authorized, the impact on adherents of other faiths is especially hurtful.

This problem – whether to impose a "nonsectarian" condition on officially-sponsored prayers or instead to allow for manifestly sectarian religious exercises – is intractable. Both choices are unacceptable, and both hurt religious believers. It is a central function of the First Amendment to avoid this dilemma by prohibiting government-sponsored prayers of any form, while ensuring that private prayer is preserved and protected.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

WALTER E. DELLINGER
Counsel of Record
PAMELA A. HARRIS
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004-1109
(202) 383-5300

STEVEN K. GREEN
AYESHA N. KHAN
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

MARC D. STERN
AMERICAN JEWISH CONGRESS
15 East 84th Street
New York, NY 10028
(212) 360-1545

JEFFREY P. SINENSKY
KARA STEIN
AMERICAN JEWISH COMMITTEE
165 East 56th Street
Seventh Floor
New York, NY 10022
(212) 751-4000

STEPHEN W. ARENT
ELIZABETH J. COLEMAN
STEVEN M. FREEMAN
DAVID ROSENBERG
ANTI-DEFAMATION LEAGUE
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

NICHOLAS MILLER
COUNCIL ON RELIGIOUS FREEDOM
110 North Washington St.
Suite 404
Rockville, MD 20850
(301) 294-8766

TANA SENN
HADASSAH
50 West 58th Street
New York, NY 10019
(212) 303-8136

GUILA FRANKLIN SIEGEL
JEWISH COUNCIL FOR PUBLIC AFFAIRS
443 Park Avenue South
Eleventh Floor
New York, NY 10016
(212) 684-6950

DAVID B. ISBELL
MICHAEL L. ROSENTHAL
FAITH D. KASPARIAN
NATIONAL PEARL
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

ELLIOT M. MINCBERG
JUDITH E. SCHAEFFER
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 467-4999

EDWARD P. LEIBENSPERGER
UNITARIAN UNIVERSALIST ASSOCIATION
Nutter, McClennen & Fish
One International Place
Boston, MA 02110
(617) 439-2000

Counsel for Amici Curiae

APPENDIX A

INTERESTS OF THE AMICI

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, and religious rights of American Jews. It believes that the separation of church and state is essential to the well being of American Jewry and has participated in almost all of this Court's cases involving that principle.

* * *

The American Jewish Committee ("AJC"), a national organization of approximately 100,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews and is dedicated to the defense of religious rights and freedoms of all Americans. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value to the free exercise of religion in our pluralistic society. In support of this vital principle, AJC through the years has filed numerous briefs in this Court. We do so again in the conviction that officially sanctioned religious observances of any kind do not belong in public schools.

* * *

Americans United for Separation of Church and State is a national, public interest organization committed to preserving separation of church and state and religious liberty. Americans United believes that a secular public school system is a cornerstone of our democracy and that matters of faith should be directed by the home and the church, not by public school officials. On behalf of its members and other individuals, Americans United has participated in many cases involving school prayer and other religious activities in

school settings, and is serving as counsel in *Chandler v. James*, No. 99-935, currently pending before this Court.

* * *

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. ADL has always adhered to the principle that these goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion. To that end, ADL has filed *amicus* briefs in such cases as *Lee v. Weisman*, 505 U.S. 577 (1992), *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *School Dist. v. Schempp*, 374 U.S. 203 (1963). ADL is able to bring to the issues raised in this case the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

* * *

The Council on Religious Freedom is a non-partisan, non-profit national advocacy group that appears frequently in court on issues of religious freedom and the separation of church and state. The Council most recently argued the Supreme Court case regarding the use of taxpayer funds by private religious schools, *Mitchell v. Helms*. The Council has thousands of supporters throughout all fifty states, all of whom are concerned with minimizing the role that government plays in religious matters. Due to its ongoing advocacy and educational efforts on church/state issues, the Council has a strong interest in the outcome of the present case.

* * *

Hadassah, the Women's Zionist Organization of American, Inc., is the largest women's and the largest Jewish

membership organization in the United States, with over 300,000 members nationwide. Founded in 1912, Hadassah is traditionally known for funding and maintaining health care institutions in Israel. However, Hadassah also has a proud history of protecting the rights of the Jewish community in the United States. Hadassah has long been committed to the protection of the strict separation of church and state that has served as a guarantee for religious freedom and diversity. Hadassah has participated in numerous *amicus* briefs upholding this fundamental principle. Hadassah opposes any effort to bring organized religion into the public schools, including the introduction of officially sponsored, organized or sanctioned prayer at public school sporting events or programs.

* * *

The Interfaith Alliance is a non-partisan, faith-based, national organization headed by clergy and lay people of faith with an active membership of over 100,000 religious people representing more than 50 faith traditions. The Interfaith Alliance is dedicated to promoting the positive role of religion as a healing and constructive force in public life.

As The Interfaith Alliance looks to the next century, we recognize that positive sea-change in our society will only occur through interfaith cooperation, drawing not on dogma but rather the shared principles that lie at the heart of our nation's diverse religious landscape. A commitment to core values, including compassion, civility, and mutual respect for human dignity and diversity, unite us as a people of faith and goodwill.

The Interfaith Alliance mobilizes and empowers religious leaders and other people of faith to play a critical role in the life of our nation by participating in the political process. Civic participation is at the center of our mission and program. All people of faith have the responsibility and the

potential to act as agents of renewal in our increasingly divided nation.

Our religious traditions teach that every individual is divinely endowed with infinite dignity and worth. As people of faith we embrace our religious diversity and work together to make our society more inclusive, our politics more civil, and our nation more appreciative of the strength of our diversity. We believe that we can have a powerful healing effect on the civic life of our nation when we build acceptance, trust, and compassion in civic affairs.

* * *

The Jewish Council for Public Affairs (JCPA), formerly the National Jewish Community Relations Advisory Council, is an umbrella organization of 13 national and 122 local Jewish public affairs and community relations agencies across the United States. Founded in 1944, the JCPA is committed to the dual mission of safeguarding the rights of Jews here and abroad and also promoting a just society for all Americans. The JCPA believes that the Establishment Clause is an essential bulwark in protecting the religious freedoms of people of all faiths, and it has therefore participated as *amicus* in numerous Establishment Clause cases before this Court, most recently, *Mitchell v. Helms*. The Union of Orthodox Jewish Congregations of America and the Jewish Community Relations Council of New York abstain from JCPA's participation in this brief.

* * *

People for the American Way Foundation ("People For") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has more than 300,000 members nationwide. People For has

frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including cases such as *Lee v. Weisman* concerning school prayer and the separation of church and state. People For has joined in filing this *amicus* brief in order to help vindicate the important First Amendment principles at stake in this case, particularly the principle that government-sanctioned prayer at public school events violates the First Amendment. Moreover, as an organization including numerous religious leaders and individuals, People For strongly believes that such government-sanctioned prayer will damage religious liberty for people of faith in our country.

* * *

National PEARL is a diverse coalition of grassroots and national religious, educational, and civic organizations that seeks to preserve religious freedom and the separation of church and state in public education. Cases in which National PEARL recently has been involved include *Agostini v. Felton*, 521 U.S. 203 (1997); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994); and *Edwards v. Aguillard*, 482 U.S. 578 (1987).

* * *

Soka Gakkai International (SGI)-USA, established in 1960, is a diverse American Buddhist community with 300,000 members and 71 centers throughout the United States. SGI-USA is committed to the principles of both free religious expression and separation of church and state as embodied in the First Amendment of the United States Constitution, and joins this brief in the interests of protecting these fundamental rights.

* * *

The Unitarian Universalist Association is a religious association of more than one thousand congregations in the United States, Canada and elsewhere. Through its democ-

ratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. The Association has adopted numerous resolutions affirming the principles of separation of church and state and religious freedom. In particular, the Association has consistently adopted resolutions opposing all deviations from religious neutrality in public schools including government sponsored devotions and prayers.